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RWANDA GACACA TRADITIONAL COURTS: AN
ALTERNATIVE SOLUTION FOR POST-GENOCIDE
JUSTICE AND NATIONAL RECONCILIATION

by

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March 2005

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**RWANDA GACACA TRADITIONAL COURTS: AN ALTERNATIVE
SOLUTION FOR POST-GENOCIDE JUSTICE AND NATIONAL
RECONCILIATION**

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Submitted in partial fulfillment of the
requirements for the degree of

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ABSTRACT

Initially, many Rwandans placed their hopes in the well-funded International Criminal Tribunal for Rwanda (ICTR) but it has been plagued by inefficiencies and delays. Although the Rwandan national courts have tried a significantly larger number of cases than the ICTR, they are also criticized as being too slow. Therefore, the government of Rwanda has proposed using the “Gacaca” traditional courts to accelerate post-genocide justice. The purpose of this thesis is to determine whether, and under what conditions, the Gacaca courts can be an effective mechanism of justice and national reconciliation.

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I. INTRODUCTION

A. PURPOSE

After the Rwandan genocide, which occurred between April and July 1994, Rwanda was a totally destroyed country. The painful legacies of that tragedy are a million people dead, legions of traumatized survivors, shattered social structures, and thousands of suspects in prison.

This situation poses tough challenges for the Government of Rwanda. First, in order to bring peace, stability and harmony, justice must be done. This is difficult because there is an acute shortage of legal staff either because they were killed, or because they are now in prison or in exile.

Initially, many Rwandans placed their hopes in the well-funded International Criminal Tribunal for Rwanda (ICTR) but it has been plagued by inefficiencies and delays. Although the Rwandan national courts have tried a significantly larger number of cases than the ICTR, they are also criticized as being too slow. Therefore, the government of Rwanda has proposed using the “Gacaca” traditional courts to accelerate post-genocide justice. The purpose of this thesis is to determine whether, and under what conditions, the Gacaca courts can be an effective mechanism of justice and national reconciliation. Gacaca is a system that enlists the communities to prosecute, deliberate and enforce decisions. This aspect of ownership is the strength and success of Gacaca jurisdictions, one that will help to rebuild Rwanda’s shattered social structure.

B. IMPORTANCE

It has been widely argued that past ethnic and political divisions and oppression in South Africa and Rwanda were the root causes of the gross human rights violations experienced in these countries. In Rwanda, however, there is little evidence of wide-ranging ethnic conflict in pre-colonial times, but rather a deliberate cultivation by Belgian colonial rulers of an elite Tutsi group at the expense of Hutus. This resulted in a pattern in Rwandan public life in which superficial physical and cultural differences were accentuated for political gains. Rwandans to this day suffer the consequences. The

genocide in Rwanda in 1994, in which up to one million mainly Tutsis and moderate Hutus were killed in 100 days, was one of the most devastating acts of genocide since the Holocaust.

Ten years after the genocide, Rwanda is faced with a range of complex challenges. Most pressing among these, are the twin challenges of putting on trial the sheer numbers of alleged perpetrators currently incarcerated, and the need to foster reconciliation and national unity on the other by eliminating the culture of impunity that has hitherto been part of the Rwandan experience.

C. LITERATURE REVIEW

While the literature has shown that these challenges cannot be met through the formal judicial process alone, Rwanda has initiated a revived traditional community forum for dispensing justice, the *Gacaca* courts, but in a modified form. The main questions are whether these traditional courts used to deal with simple crimes can achieve these huge objectives.

Should they duplicate the form of the South African Truth and Reconciliation Commission (TRC) and forgiveness, which is believed by many as a success, or should the solution be more in the form of the Nuremberg Trials, which often used the death penalty as a form of just vengeance? One thing is certain: this topic is new, there is little research on it; however, there appears to be many critics of these courts and few or no suggested alternatives.

The purpose of this thesis is to analyze different theories related to Gacaca courts critically by reviewing literature on the South African TRC and other case studies, formulate arguments that support solutions to the Rwandan justice and reconciliation problems thereby allowing the choice of the best alternative.

Mark A. Dumbl, Assistant Professor, William H. Brown School of Law, University of Arkansas at Little Rock, questioned the ability of these trials to achieve these goals and suggested that they may, in fact, aggravate ethnic identity politics and threaten Rwanda's long-term stability.¹ Dumbl argues that pardons are necessary to

¹ Mark A. Drumbl, "Punishment. Post-Genocide: From Guilt to Shame to Civis in Rwanda," *New York University Law Review*. Vol. 75, 1. (November 2000). Document retrieved from <http://Proquest.umi.com>, Accessed September 2004.

achieve stability. In taking this stand, the author forgets that crimes against humanity are different from other usual crimes, in that, they are not forgivable but people may be.

Amnesty laws grant impunity and prevent accountability before the law, while bringing violators to justice sends a clear message to all that human rights violations will not be tolerated or allowed to continue.

Prosecution is necessary to establish the rule of law. Some analysts argue that the prosecution of crimes of states is essential to building the strong civil society required for effective democratic governance.

Luc Huyse, for example, says: “unless crimes are investigated and punished, there can be no real growth of trust, no implanting of democratic norms in society at large, and therefore no genuine consolidation of democracy.”²

Huyse’s argument holds true since prosecution is necessary to promote the rule of law. Equality before the law and substantive justice benefits society by guarding against arbitrary state actions and guaranteeing political rights. Failure to hold members of the former regime accountable perpetuates their feeling of impunity and may vitiate the authority of law itself. Justice is a necessary precursor to reconciliation: victims presumably are more willing to forgive, or at least tolerate, wrongdoers who have faced justice and paid their dues. Reducing tensions, building and promoting reconciliation are considered as essential for long-term stability.

Martha Minow, in her book *Between Vengeance and Forgiveness*, asks a number of interesting questions:

- Is it possible for individuals to heal in the wake of mass atrocities?
- Is it meaningful even to imagine the healing of a nation riven by oppression, mass killings, and torture?
- Can and should there be alternatives to traditional institutional responses?
- Should justice or truth take precedence?
- What value are facts without justice?³

² Luc Huyse, “Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past,” *Law & Social Inquiry*, Vol. 20, No. 1 (Winter 1995), 340.

³ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, (Boston: Beacon Press, 1998), 9.

Trust among people is essential for development. Nat. J. Colletta and Cullen assert that social cohesion can be measured by the density and nature of organization and networks (both vertical and horizontal) and by members' sense of commitment and responsibility to these groups.⁴ They understand that cohesiveness of a society was founded on the basis of trust, which leads to the ability for cooperation and mutual exchange for material, labor and information. However, this trust was lost during the genocide because one group killed their neighbors, destroyed their properties and humiliated them.

Prosecution and repentance of the wrongdoers can begin to heal the wounds of those who suffered from official abuse, restore the lost sense of national dignity, and establish faith in the new government as it attempts to build a democratic system based on respect for rights and rule of law.

In short, many diverging theories exist concerning justice in Rwanda. Some of these theories may have applied well elsewhere but cannot be effectively applied in Rwanda. However, the Gacaca courts may find some useful lessons from those theories or cases such as the South African TRC. On the other hand, those literatures advocating amnesty and not prosecution may not be helpful to Rwanda given the history and degree of impunity and the weight of the genocide legacy on Rwandan society. It is paramount to prosecute genocide perpetrators in order to cast out the culture of impunity and be able to foster national unity and reconciliation.

Thus, those arguments that support prosecution associated with reconciliation and not pardon will be adopted. The South African TRC might provide an interesting case study to compare with the Gacaca courts because they share some similarities.

D. MAJOR QUESTIONS

1. Main Question
 - Does the Gacaca traditional courts system provide the best solution to post-conflict justice in Rwanda?

⁴ Collette J. Nat and Michelle. L. Cullen, "The Nexus between Violent Conflict, Social Capital and Social Cohesion: Case study from Cambodia and Rwanda," *Working Paper No. 23, The World Bank Social Development Family Environmentally and Socially Sustainable Development Network*, Washington, D.C., (2000). This paper can also be viewed at <http://www.worldbank.org/socialdevelopment>, Accessed March 2005.

2. Secondary Questions

- Will massive trials reconcile Rwandans?
- How might the Hutu and Tutsi communities react during the trials?
- What obstacles must Gacaca overcome to succeed?
- How do the Gacaca courts assert their legitimacy?
- What can be done to maximize its potential for success?

E. ARGUMENT

The argument is that for decades the people of Rwanda lived in harmony, intermarried, had tight social networks, and never perpetrated any kind of fratricide. The ethnic and political massacres of 1994 were a result of contrived political machinations, not the result of inherent ethnic or tribal tensions. On the other hand, the International Tribunal on Rwanda has failed to achieve tangible results to bring justice and reconciliation. Also, the Rwandan national courts have also been unable to perform satisfactorily. Thus, the belief is that by combining lessons from the TRCs and elsewhere, the Rwandan Gacaca might attain their objectives.

F. METHODOLOGY AND SOURCES

The methodology used in this research is as follows. First, existing literatures on Rwanda that depict the origin and causes of the polarization of the Rwandan people and their differentiation into ethnic groups are examined. Next, a review of various literatures written on Gacaca and on justice in other post-conflict societies follows. This thesis examines different Truth and Reconciliation Commissions but dwells much on that of South Africa. The South African and Rwandan conflicts having some similarities, and the TRC may provide some inputs, especially in the areas of reconciliation. Elsewhere, the Sierra-Leone case may provide some inputs since Sierra Leone will prosecute the war criminals. Also, by combining both the TRC and the Sierra Leone case, it might be possible to obtain contributions for the Gacaca Model of combining prosecution and reconciliation. In addition, other cases, such as the Nuremberg and Tokyo Trials, are analyzed to assess their impact on the stabilization of the war-torn societies.

G. CHAPTER-BY-CHAPTER SUMMARY

Chapter II, Background to the Rwandan Conflict highlights the legacy of genocide and the perpetual impunity that existed during the post independence regimes.

Chapter III, Challenges of Post-War Justice discusses the importance of post-war justice as a tool to bring closure and begin the process of national reconciliation. This chapter also presents the following historical examples of post-war justice:

- Germany
- Japan
- South- Africa
- Sierra-Leone

In addition, it finally provides the lessons learnt and the implications for Rwanda.

Chapter IV, Post-War Justice in Rwanda highlights the challenges of post-war justice and the slow justice in Rwanda.

Chapter V, The Gacaca Justice System examines the background and history of this traditional Rwandan System. It also explores the strengths and weaknesses of applying the Gacaca system in today's Rwanda.

Chapter VI presents the conclusions.

II. BACKGROUND TO THE RWANDAN CONFLICT

Rwanda is a landlocked country found in East Central Africa, south of the Equator. Before the colonial era, the people who occupied the territory of Rwanda developed a unique culture, language, a system of government and a traditional justice system called “Gacaca”. The Rwandan people engaged in a variety of economic activities such as agriculture, animal husbandry, pottery, iron works and others.

Pre-colonial Rwanda was a highly centralized Kingdom presided over by Tutsi kings who hailed from a single ruling clan. The *Mwami* (king) was treated like a divine being, who “was regarded as a personal embodiment of Rwanda.”⁵ The *Mwami* ruled through three categories of chiefs: cattle, land, and military chiefs. The cattle chief or *umutwale w'inka*, ruled over the grazing lands, the land chief or *umutwale w'ubutaka*, was entrusted with the management of land resources and taxation, while the military chief or *umutwale w'ingabo*, was in charge of defensive matters including the recruitment of fighters for the king’s armies.⁶ The chiefs were predominantly, but not exclusively, Tutsi, especially the cattle and military chiefs. While the relationship between the king and the rest of the population was unequal, the relationship between the ordinary Hutu, Tutsi and Twa was symbiotic or one of mutual benefit mainly through the exchange of their labor specialties.⁷ A clientel system comprised of “*Ubuhake*” and “*ubukonde*” permeated the whole society like “a seamless web, linking men in a relationship of mutual dependence.”⁸

Ubuhake, a clientage system based on cattle, was mainly confined in pastoral areas in the central, eastern and southern parts of the country. This system embodied two characteristics. First, the clientage system was a highly personalized relationship between a client and a patron, involving the exchange of certain commodities and services. The obligations arising from the clientage system relationship fell evenly upon the Hutu and

5 Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed with Our Families: Stories From Rwanda*, (Farrar: Straus and Giroux, 1998), 49.

6 Gerard Prunier, *The Rwanda Crisis, History of a Genocide*, (Columbia University Press, 1995), 11.

7 Jill D. Rutaremara, “Genocide in Rwanda: Towards A Theoretical Approach,” Master’s Thesis, Naval Postgraduate School, Monterey, California, 2000, 39.

8 Rene Lemarchand, *Rwanda and Burundi*, (Praeger Publishers, 1970), 36.

Tutsi.⁹ Second, the *ubuhake* clientage system involved social mobility within the Rwandan society. An ambitious Hutu, who was able to accumulate wealth (cattle), could make his way up the social ladder to be assimilated into the Tutsi caste, otherwise known as *kwihutura*, which literally means, “shedding Hutuness.”¹⁰ On the other hand, a Tutsi who lost cows would descend from the social ladder and would be regarded as Hutu as his assets shrank over time. The Twa comprised those who specialized in pottery making or lived off the land as hunters or gatherers, or who otherwise lived independently in forests. The Twa remained generally marginalized. However, a few potters gained wealth by exchanging their products for milk and food, and were able to penetrate the upper hierarchy and become *Tutsified*.

Ubukonde was a clientage system based on land. It was predominant in the Northwestern parts of present day Rwanda, which were mainly agricultural areas. It is worth noting that the economic value and the prestige that a cow represented in Rwandan society at that time, made *ubuhake* clientage more popular than *ubukonde*.

It is very important to note that before colonialism, the Rwandan people identified themselves by their clans and not by ethnicity. The 18 clans that existed in Rwanda cut across the three groups. Marriage and other social interactions also bridged these groups. Furthermore, all clans were expected to take up arms. The Tutsi were not the only ones to fight, Gérard Prunier writes. “All men were part of the *Intore* (fighting regiments).”¹¹

In 1899, Rwanda became a German colony, albeit the German colonial presence was very limited. The Germans practiced indirect rule, through the *Mwami*. In 1919, Rwanda became a mandate territory of the League of Nations under Belgian administration.¹² Thus, the Belgians inherited a colony that was one of the few African countries in which the indigenous people spoke the same language, shared the same culture, intermarried, belonged to the same clans and were commingled in the same geographical territory. Prior to this colonial era, Hutu, Tutsi and Twa coexisted and showed no predisposition towards conflict.

9 Rene Lemarchand, *Rwanda and Burundi*, (Praeger Publishers, 1970), 37.

10 Ibid., 39

11 Prunier, 14.

12 Ibid., 26.

While the German rule in Rwanda had little or no impact, the Belgians introduced policies that ultimately proved to be socially divisive. These included the following:

- Politics of ethnic divisions
- Forced labor,
- Deportations and massive expulsions of populations,
- Persecutions,
- Attacks against civilian populations,
- Assassinations,
- Mass killings.

A. DIVIDE AND RULE POLICY

The Germans, and later the Belgians, advanced theories about the separate origins of Tutsi and Hutu, based on racial theories developed in the 19th century. They measured physical body parts and catalogued allegedly different physical characteristics of the three groups. They taught their theories in schools, and based administrative policies on them. Jean Paul Harroy, the resident governor of Rwanda and Burundi (from 1955 to 1962), wrote:

Gifted with a vivacious intelligence, the Tutsi displays a refinement of feelings, which is rare among primitive people. He is a natural borne leader, capable of extreme self-control and of calculated good will.¹³

This type of impression passed for informed scientific canon, which governed the decisions made by the Germans and even more so by the Belgian colonial authorities.¹⁴ More importantly, it had a destructive impact on traditional Rwandan society and social structure. It created a false superiority complex among Tutsi. The Hutu were portrayed as an inferior servile group. They were the true black Africans and considered unfit to be in any positions of leadership. Some schools separated Tutsi and Hutu, a segregation that continued in the workplace. “A dangerous social bomb was almost absent mindedly manufactured through the peaceful years of *abazungu* (whites) domination,¹⁵” Prunier writes. Identity cards, introduced in 1932, stated one’s ethnicity, thus fixing a person in a

¹³ Prunier, p. 16, as quoted in Jean P. Harory, *Le Rwanda de la Feodalité à la Democratie (1955-1962)*, (Brussels: Hayez 1984).

¹⁴ Prunier, 9.

¹⁵ Ibid.

social caste from which there was no escape. This allowed the colonialists to differentiate Tutsi from the rest (Hutu, Twa) for the purpose of administration rule. Not only did this official distinction sow the seeds of hatred between Hutus toward Tutsis, but it also curtailed traditional social and economic mobility.

Table 1. The Astrida (now Butare) College Enrolment Breakdown by Ethnic Origin.
(From: René Lemarchand, Chapter 4).

Year	Tutsi Pupils	Hutu Pupils
1932	45	9
1945	46	3
1954	63	19 (incl. 13 from Burundi)
1959	279	143

Later, when the anti-colonial wave moved across Africa and the Tutsi led the demands for independence, both the Belgian colonial administration and the church turned against them. They promoted a Hutu elite to counter the Tutsi. According to Prunier, this was brought about by “the combination of changes in white clerical sympathies, struggle for the control of the Rwandese church, and increased challenges of the colonial order by the Tutsi elite.”¹⁶ The Belgian approach toward Rwanda and the ethnic politics practiced in Belgium, where “the Francophone Wallon minority had for centuries dominated the Flemish majority.”¹⁷ After the Second World War, when the Flemish had gained power, the Flemish priests replaced the Wallon priests in Rwanda. These Flemish priests identified with the Hutu and encouraged their aspirations for political change.¹⁸

The violence began with the 1959 coup d'état, in which the monarchy was abolished by both the Belgians and the Hutu elite following the mysterious death of *Mwami* Rudahigwa. The king was rumored to have been assassinated by his Belgian

16 Prunier, 43.

17 Gourevitch, 58.

18 Ibid.

Physician in Bujumbura in August 1959 by lethal injection. Ethnic propaganda about the Tutsi oppression against Hutu was circulated widely with official approval and Belgians helped to organize what they called the Hutu Social Revolution of 1959. In short, they turned against the Tutsi and selected the Hutu as their new partners. The Tutsi were punished through killings, expulsions, detentions, destruction of property and other forms of crimes against them. These policies were continued by the post independence administration and culminated in the 1994 genocide.

B. FORCED LABOR

The Belgian colonial administration introduced *Ubuletwā*, a forced labor system, in cash crop production, road construction, mining and other public works. As Newbury comments:

Not only was *ubuletwā* generalized where it did not exist before, but its functioning was also radically altered. Where the royal chief had dealt globally with whole lineages on a hill, the white administration now considered it an individual obligation, meaning that a family could no longer delegate a strong young good-for-nothing to sweat for all its members but that every single male (and even at times, when needed, women and children too) had to go and perform the *corvée*.

Rwandans now had less time to grow food crops or perform activities that traditionally provided them a living. According to Prunier, this forced labor “could swallow up to 50-60% of a man’s time.”¹⁹ No salary was paid to them. The traditional chiefs were required to enforce this policy.

Nothing so vividly defined the divide as Belgian regime of forced labor, which required armies of Hutu to toil *en masse* as plantation chattel, on road construction, and in forestry crews, and placed Tutsi over them as taskmasters.²⁰

Defaulters were stripped and flogged in public, sometimes in front of their children and wives, which was taboo. This degrading treatment was not only a war crime according to Articles 4(e) of ICTR statute²¹ and Art 8 of ICC statute²² in modern day

19 Prunier, 35.

20 Gourevitch, 57.

21 “Statute of the International Criminal Tribunal for Rwanda.” *Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II*, Available from <http://www.ictr.org/ENGLISH/basicdocs/statute.html>, Accessed December 2004.

Rwanda, but it also created discord among the ethnic groups in Rwanda, as Tutsi chiefs who collaborated in this system were viewed by the Hutu as representing the Tutsi who oppressed the Hutu. The Belgians and Hutu extremist politicians sowed ethnic discord and eventually prepared the conditions for the 1994 genocide who later used this in propaganda and literature.

C. DEPORTATIONS AND MASSIVE EXPULSIONS OF PEOPLE

To implement colonial policies, the Belgian colonial administrators started a policy of the deportation of people, political leaders and others who opposed their policies. In 1931, the Belgians and the Church deported *Mwami* Yuhi V Musinga to Moba in the then Belgian Congo, for being too independent²³. This culminated in the mass forced exile of entire ethnic populations of Tutsi reaching a climax in 1959 and 1960. The Tutsi were forced into exile in neighboring countries and in the internally displaced people camps (IDPCs), where they were subjected to Tsetse flies that cause sleeping sickness. By the time of the proclamation of independence in 1962, the number of refugees or displaced persons was already estimated at 300,000, of whom 120,000 were outside the country²⁴. This act constituted a crime under crimes against humanity, under Articles 3(d) of ICTR statute²⁵ and 7(1) of the International Criminal Court (ICC) statute²⁶ in modern day Rwanda.

D. PERSECUTIONS

A culture of persecution, the intentional and severe deprivation of fundamental rights to certain ethnic groups was introduced during colonial rule. This persecution was reflected in political, racial, ethnic, and religious settings. The result was a mass exodus

22 “Rome Statute of the International Criminal Court.” *Article 8: War Crimes*, Available from <http://www.un.org/law/icc/statute/romefra.htm>, Accessed December 2004.

23 Prunier, 30.

24 Charles Villa-Vicencio and Tyrone Savage, *Rwanda and South Africa in Dialogue, Addressing the Legacies of Genocide and Crime against Humanity*, (University of Cape Town Press, 2000), 31.

25 “Statute of the International Criminal Tribunal for Rwanda.” *Article 8: War Crimes*, Available from <http://www.ictr.org/ENGLISH/basicdocs/statute.html>, Accessed December 2004.

26 “Rome Statute of the International Criminal Court.” *Article 7: Crimes against Humanity*. Available from <http://www.un.org/law/icc/statute/romefra.htm>, Accessed December 2004.

of Tutsi to neighboring countries. Starting in early 1960, some 130,000 Rwandan Tutsi were eventually forced to the Belgian Congo, Burundi, Tanganyika (now Tanzania) and Uganda, where they joined those already in exile.²⁷

E. ATTACKS AGAINST CIVILIAN POPULATION

These actions constitute some of the worst war crimes and are prohibited under the Law of War as stipulated in the 1949 Geneva Convention. The worst attacks against civilian populations during the colonial rule occurred in 1959-60 when the colonial administration used the Congolese soldiers, with the support of Belgian helicopters, to attack Tutsi populations countrywide.

They forced the Tutsi to leave Rwanda saying that they would not be safe from the Hutu who were allegedly angry because of the Tutsi exploitation and oppression, which entrenched a culture of war crimes that characterized Rwanda.²⁸

F. ASSASSINATIONS

King Mutara Rudahigwa's death in 1959 paved the way for assassinations and mass murders in Rwanda. In 1959, 8, 000 Tutsi were brutally killed, marking the beginning of genocide in Rwanda. By 1962, 22,000 Tutsi had been murdered, ^{and} another 10,000 Tutsis were slaughtered from December 1963 to January 1964 - including every single Tutsi politician living in Rwanda.²⁹ These events did not attract international reaction, except from two Nobel Prize winners Bertrand Russel and Jean-Paul Sartre who described the killings as the most horrible and systematic massacres the world had witnessed since the Jewish genocide by the Nazis.³⁰

G. MASS KILLINGS

The destructive development that spanned from 1959 to 1961 became known as the *1959 Hutu Revolution*. It led to the abolition of the monarchy and the removal of all political/administrative Tutsi structures. Between March 1961 and November 1966, some of the leaders of the exiled refugee groups launched a number of attacks against Rwanda. The attacks of these groups, known as *Inyenzi* (cockroaches), were used as a pretext by

27 Prunier, 51.

28 Villa–Vicencio and Savage, 32.

29 Prunier, 56.

30 Ibid.

the regime to launch indiscriminate reprisals against Tutsis inside Rwanda. President Kayibanda (the first President of Rwanda from 1962 to 1973) launched an anti-Tutsi campaign that included a series of arrests and executions. An intensive campaign, through speeches by leaders, radio transmissions and even popular songs was executed at this time. The propaganda claimed that the Tutsis were foreigners who had conquered the Hutu people and subjugated them to serfdom for four centuries. To ensure effective Tutsi exclusion from army, civil service and education, identity cards were retained. The chances for national unity waned as the regime continued to propagate the old racial theories using them against the Tutsi to enflame ethnic antagonism.³¹ Faced with political divisions in the regime and growing discontent among the population, in July 1968, the National Assembly decided to establish a Parliamentary Investigating Commission. The commission traveled throughout the country to gather public views about the state of the country. The commission produced a substantial report that reflected public disappointment in the Kayibanda regime:

National harmony, confidence, solidarity, collaboration, patriotism have lost their value and no longer exist. In their place, it is disparagement, hatred, egoism, antagonism, dishonesty, and hunt for money, anarchy and regionalism. The masses complain that leaders lied to them by telling them that their revolution was going to liberate them from injustice. They now realize that it is a way of securing posts. Once these posts are acquired, the injustice becomes worse than ever before. The popular masses are not afraid of stating that the former regime of regime of investigating the Chiefs with office was more preferable to the current electoral system because with the latter, those who deserve to be elected are aside and those who do not deserve are designated as candidates.³²

Mass killings continued unabated in Rwanda climaxing in the 1994 genocide. In both post-independence regimes, Tutsi were continuously used as scapegoats for any failure. They used the return of Tutsi refugees as a scare tactic to play to Hutu fears for their physical security on the premise that their land would be confiscated or redistributed to returning Tutsi. In spite of these tensions, Tutsi and Hutu continued to live together, to work together, to intermarry, and to socialize.

31 Omaar Rakya and Alex de Vaal, *Rwanda: Death, Despair and Defiance*, (London, UK: African Rights, 1995), 12.

32 Phillip Reyntjens, *Pouvoir et Droit au Rwanda*, as quoted in Villa–Vicencio and Savage, 32.

In 1990, the Rwandan refugees, under the umbrella of the Rwandan Patriotic Front (RPF) and its military wing the Rwandan Patriotic Army (RPA) after several unsuccessful diplomatic attempts, launched an armed struggle against the regime of Habyarimana from Uganda. The regime reacted by killing the Tutsi, and imprisoning both the Tutsi and some of the Hutu. Some Hutu elite, both in and outside the mainstream of political power, also launched anti-Tutsi propaganda and openly called for the extermination of the Tutsi. This propaganda was being conducted as political negotiations between the RPF and the governments were on going.

In August 1993, the two parties signed the Arusha Peace Agreement, which was supposed to be followed by a Broad Based Transitional Government of National Unity (BBGT) comprised of the ruling party-*Movement Revolutionnaire National Democratique* (MRND), the RPF, and the opposition parties. The agreement entailed Power Sharing, Integration of the Armed Forces and the Rule of Law, among others. On the surface, the parties to the negotiations seemed to be successful in paving a way for a stable Rwanda, but “underneath they were quite fearful of the future because the extremists were venomously opposed to the accords.”³³ This worry was concretized by President Habyarimana when, three months after he signed the Arusha accords, he called them “a scrap of paper.”³⁴ According to Prunier, Habyarimana himself signed the agreement as a tactical move calculated to buy time, shore up the contradictions of the various segments of the opposition, and look good in the eyes of the foreign donors.”³⁵

At the same time, the United Nations deployed its peacekeepers, United Nations Assistance Mission in Rwanda (UNAMIR) under chapter VI, to assist in the implementation of the accords. Brigadier General Romeo Dallaire from Canada led the force.

In the meantime, extremist Hutu organized violent demonstrations nationwide intended to undermine the accords. The killing of Tutsi and the leaders of opposition continued. At the end of 1993, Minister Gatabazi Felicien, who hailed from the

33 Mohamed Abdul Latif, “Genocide in Rwanda: The Interplay of Human Capital, Scarce Resources and Social Cohesion,” Master’s Thesis, Naval Postgraduate School, Monterey, California, 2003, 19.

34 Jill D. Rutaremara, “Genocide in Rwanda: Towards A Theoretical Approach,” Master’s Thesis, Naval Postgraduate School, Monterey, California, 2000, 87.

35 Prunier, 194.

opposition, wrote to General Dallaire warning him that a dangerous conflict was brewing within Rwanda,³⁶ a view reinforced by intelligence reports. Some moderate members of the Rwandan Armed Forces (FAR) also sent letters to Dallaire informing him of deliberate plans of pushing the RPF into breaking the cease fire so as to justify the resumption of hostilities.³⁷ In addition, an extremist Radio known as *Radio Television Libre des Mille collines* (RTLM) was licensed by the government at this time and it started broadcasting daily calls to violence against Tutsi and dissidents.³⁸ It was apparent that the implementation of the Arusha Accords posed a threat to the Habyarimana government as well as to some elites from the two ruling extremist parties. The *Movement Revolutionnaire National Democratique* (MRND) and the *Coalition pour la Defence de la Democracie* (CDR), which formed the coalition of the ruling government, did not want to share power despite the agreement.

Thus, before the peace agreement could be implemented, on April 6, 1994, President Habyarimana was mysteriously killed when his plane was shot down as it tried to land at the Kanombe International Airport in Kigali, the capital city of Rwanda. On that day, the genocide started. The RPF appealed to the interim government to stop the massacres, and when the government refused to comply, the RPA pushed to stop the massacres and overthrow the regime. The new genocidal regime that came into power after the death of President Habyarimana was finally defeated in July 1994 when the RPA forces overrun the whole country. However, by this time, the genocide had already claimed more than a million Tutsi and moderate Hutu lives.

Various scholars have investigated the origins of the genocide and the reasons for its intensity. Some emphasize the role of Belgian colonizers and the Catholic Church in fomenting ethnic conflict and in sowing racial ideology, the manipulation of the Rwandan elites in exploiting that ideology for their own ends, and the vulnerability of peasants to such manipulation because of their ignorance and poverty.³⁹ There was a predisposition towards genocide by some of the Hutu extremists and that predisposition

36 Latif, 32.

37 Ibid.

38 Ibid.

39 Ibid., 29.

grew as the threat to their power increased. By eliminating the Tutsi, the Hutu extremists hoped to achieve their extermination campaign, deny the RPF support, and in the process, make it politically and militarily weak. The main goals of the Hutu extremists were to exterminate Tutsi and to stay in power.

Rutaremara further argues that the masses responded to the elite mobilization for two reasons. First, there was among the peasants an urge to grab land and the fear of losing it to the returnees.⁴⁰ This urge and fear were aggravated by the extremists, and because land is a scarce resource in Rwanda. In addition, there was concern for physical security among many Hutu. There was fear of revenge by the Tutsi for various massacres committed by the Hutu against the Tutsi since 1959. This fear was also intensified by propaganda aimed at demonizing the Tutsi.

H. CONCLUSION

The pre-colonial Rwandan society was characterized by the homogeneity and unity of all Rwandans. When the colonialists came in, they divided the Rwandans and created ethnic groups that paved the road to future atrocities. They favored Tutsi so as to exploit them for their indirect rule. This situation eventually culminated into hatred between Hutu and Tutsi. Since prejudice, ignorance and a lack of education failed to arm them to resist these blandishments, many Hutu regarded Tutsi as their exploiters and not the colonialists. The Belgian authorities also granted independence to Rwandans in a precarious period, after they had abolished the monarchy, initiated and supervised the massacres of Tutsi as well as their forceful exile.

Rwandan leaders who succeeded in the post-independence era also kept the same segregation policies. Massacres of Tutsi continued unabated up to the climate of the 1994 genocide. The late president Habyarimana regime, using the state machinery, prepared and, exploited the prevailing bad economic situation, incited the Hutu to participate in genocide. Some Hutu pushed by a desire for rewards by fear and encouraged by a culture of impunity, responded massively. The genocide was characterized by a rare intensity, cruelty and speed. Within three months, more than a million people, mainly Tutsi and moderate Hutu, were killed.

40 Rutaremara, 93.

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III. CHALLENGES OF POST-WAR JUSTICE

A. INTRODUCTION

Problems resulting from any conflict take on different patterns and dimensions that flow from the nature and magnitude of that conflict. Protracted conflicts such as the apartheid in South Africa or the violent and cruel World War leave profound consequences. Wherever mass violence occurs and affects people, transitional justice - the processes by which a state seeks to redress the violations of a prior regime - becomes imperative to repair injuries suffered by individuals and communities. People responsible for the mass killings must be brought to justice to enable the society live on. Only when this is done, can a sense of national unity be created or restored, and the impulses towards vengeance be controlled. However, devastated judiciaries and post-conflict weak democracies may find it very difficult to provide the justice. Local institutions may be unable to organize trials or regimes that directed the mass terror may still have a say in the system. This chapter will analyze the importance of post-war justice and reconciliation through an examination of the two main components of the justice process: prosecutions for crimes against humanity and truth telling. It will draw on historical cases such as the Nuremberg and Tokyo war crime trials and the more recent Truth and Reconciliation Committees in South Africa and Sierra Leone to highlight any lessons learned.

B. THE IMPORTANCE OF POST-WAR JUSTICE AND RECONCILIATION

Unless there is law, and unless there is an impartial tribunal to administer the law, no man can be really free.

Senator Robert Taft⁴¹

In countries emerging from a prolonged conflict where human rights have been seriously violated, victors and survivors may put intense pressure on new regimes to prosecute those responsible for causing the sufferings. In this way, a distinct demarcation between the old and new government can be drawn. This political pressure for victor's justice may also lead to new terms such as "denazification" in the case of Germany or

⁴¹ Donald D. Enholm, "Robert Taft and Nuremberg: The Verdict of Time," *Communication Studies*, Vol. 51, (West Lafayette, Spring 2000), 35.

“defascistization” as in Italy, meaning a society will be purged by removing elements who served the repressive regime. However, if handled improperly, as Neil J. Kritz cautions in The Dilemmas of Transitional Justice, such action may deepen rather than heal the divisions within the nation. He cites the trial and execution of former dictator Nicolae Ceausescu following the immediate fall of his government in Romania as an example, which created indignation among both nationals and international community.⁴²

Thus justice can take different forms depending on the choices of the affected people, the degree of their suffering, and the weight of the crime and other realities. Some people advocate a retributive type of justice while others prefer the restorative model of justice. A restorative justice as Harrell puts it, emphasizes local forums, popular participation, deliberative rather than adversial procedures and penalties that have a restitutions component⁴³. The bottom line in this model is the preservation of the cohesion of the society. The retributive form of justice is the formal prosecution, which imposes a penalty or injury for a violation. Whatever form is the choice, they all desire to achieve common objectives:

- The elimination of impunity for the past human rights violations. Impunity results from tolerating crimes. When a crime is committed and there is no accountability or punishment imposed upon culprits. For example in Rwanda, genocide started as early as 1959 with the killing of Tutsi, continued unabated in 1966, 1973 up to the climax of 1994.⁴⁴ During this time, the Hutu community never realized it was a crime to kill the Tutsi because authorities never disapproved killing Tutsi. In this case, justice would restore the moral order by eradicating the culture of impunity that has subjected the country to brutal cycles of violence.
- The importance of justice to deter future human rights violations. By prosecuting and punishing the perpetrators, justice gives a warning that future infractions will face the full force of the law.
- The importance of rehabilitating the criminals. The latter are first of all human beings; therefore they possess rights like everyone else. These individuals need to be educated to understand the wrong they caused to their victims, to society, and to themselves. They need to be prepared to

⁴² Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, (Washington, US Institute of Peace, 1995), xxi.

⁴³ Peter E. Harrell, *Rwanda's Gamble Gacaca and A New Model of Transitional Justice*, (NY, Writers Club Press, 2003), 85.

⁴⁴ Prunier, 37.

rejoin society when they complete their punishment because if not rehabilitated, they are likely to commit same crimes again in the future.

- Reconcile and rebuild society through justice. War kills not only people but it also eliminates social networks. These networks take time to reconstitute, especially in a society that has experienced genocide or holocaust. In Rwanda for example, neighbors killed neighbors, friends killed friends, and traders killed partners, and so on. Thus, it is only when the perpetrators face justice, tell the truth to the survivors, and even ask forgiveness that a process of reconciliation can begin. Relationships must be restored so that the society can begin to rebuild.
- Establish a clear and public separation between the old regime and the new government. Citizens have to realize the difference between the “ancient regime” and the new one so as to give it legitimacy.
- In dealing with human abuses, different countries choose different forms of justice. There are some nations that opt for a retributive form or trials to prosecute perpetrators from the past such as the Nuremberg and Tokyo Trials, or restorative justice such as the South African Truth and Reconciliation Commission (TRC). Rather than punitive justice measures which punish, restorative processes strive to create peace in communities by reconciling the parties and repairing injuries caused by the conflict. Others might decide to mix TRCs and war crime trials like in Sierra Leone. The next section will look at the first option dealing with the Nuremberg and Tokyo Trials and their post-war contributions.

C. THE NUREMBERG AND TOKYO TRIALS

International military tribunals were instituted by the victorious powers of the WWII to prosecute the war criminals. Though these tribunals were established in several places under the superpowers’ occupation, two of them, one in Nuremberg in Germany and another in Tokyo –Japan, became historic by trying those with most responsibilities in war crimes. This section will first discuss the challenges faced by the Nuremberg and Tokyo trials and will conclude by giving their contributions in the stabilization of those nations.

1. Nuremberg Trials

The World War II, initiated by the Axis powers comprising of Germany, Italy and Japan striving for regional supremacy, reached unprecedented dimensions of destruction and brutality. The brutality characterized by the German military’s treatment of the population of the occupied countries; its bid to exterminate the Jews, Gypsies and Slavs was beyond comprehension. Despite, the incompatible ideologies, the Soviet Union on one hand with communism, and the United States, Britain and France on the other with

democratic capitalism, forged an alliance and managed to defeat the Axis powers after six years of mayhem. This victory however was, achieved at a terrible human loss of 17 million soldiers and 34 million civilians, along with material and cultural losses including destruction of art treasures, which were beyond calculation.⁴⁵ The allied powers, after a series of declarations, which had started before the war ended, signed the London Agreement of 1945.⁴⁶ This declaration marked the birth of the International Military Tribunal (IMT) at Nuremberg and Tokyo. For the first time in modern era, crimes recognized by the international community, were going to be enforced through an international penal process.

However, considerable disagreements characterized these trials right from the outset, mainly pertaining to their basic purpose. For example, the British initially favored summary execution of major war criminals, while the Soviets advocated a special international tribunal for prosecuting Hitler, his close advisors and military leaders. The Americans and French wanted the tribunal a record history, educate the world, and serve as a future deterrent.

The drafting of the Nuremberg Charter was further complicated by the difference in national criminal procedures of the four allies. Their conceptual differences were never reconciled, but they eventually agreed upon the need to convict senior Nazi officials. They also sought to reconcile their different legal systems through a mixed process. The Nuremberg Charter eventually classified, in its article 6, the indictments into three categories of crimes set out in the IMT:⁴⁷

- Crimes against peace
- War crimes and crimes against humanity
- Persecutions on political, racial or religious grounds.

The first category of crimes against peace included participation in the planning, preparation, initiation or waging of a war of aggression. The second category however, did not make a clear distinction between war crimes and crimes against humanity, as war crimes were defined to include murder or mistreatment of civilian population as well as

⁴⁵ Prunier, 78.

⁴⁶ Ibid.

⁴⁷ Ibid., 79.

prisoners of war.⁴⁸ The mass murder of Jews is found in the third category. However, many people, including very distinguished American lawyers, criticized these trials. They regarded the proceedings at Nuremberg as political “show trials”. For example, Harlan Fiske Stone, the chief justice of the United States Supreme Court, refused to take part in a swearing-in ceremony for the US-appointed judges to the IMT.⁴⁹

The choice of Nuremberg site for trial was made on symbolic reasons. The name “Nuremberg” symbolized the Third Reich itself. It is in this very town that Nazis staged annual rallies and there that they promulgated the notorious Nuremberg Laws of 1935, which stripped off German Jews of citizenship and made marriage or sexual relations between Jews and Germans a criminal offense.⁵⁰ In short, the city symbolized the moral disintegration of Germany under the Nazis. Thus, this choice of this venue was calculated to send a positive signal that the past traumatic regime was over and that a new one that guaranteed human rights was born. The IMT was hastily convened in Nuremberg in November of 1945 for the trial of twenty-four defendants.

After a full year, the tribunal pronounced its verdicts, which included eleven death sentences and three acquittals.⁵¹ After the first round of indictments, the United States pursued a notably lenient policy toward Nazi prisoners. A large part of the reason for this was that, with the advent of Cold War tensions, American authorities were anxious to conciliate German opinion. The United States, together with Great Britain, had earmarked Germany as a future ally in the wider scheme to contain communism.

2. The Tokyo Tribunal

After the unconditional surrender of Japan, General Douglas Mac Arthur was entrusted to oversee all the occupational matters. Thus, on 19 January 1946, in his capacity as the Supreme Commander of the Allied Powers (SCAP) for the Pacific Theater, General Mac Arthur unilaterally established the International Military Tribunal

⁴⁸ Jeremy A. Rabkin, “Nuremberg Misremembered.” Available from http://muse.jhu.edu/journals/sais_review/v019/19.2rabkin.html, 2, Accessed March 2005.

⁴⁹ Ibid.

⁵⁰ Jackson Maogoto Nyamuya, *War Crimes and Realpolitik, International Justice from World War I to the 21st Century*, (Lynne Rienner Press, 2004), 98.

⁵¹ Rabkin, 2.

for the Far East or Tokyo Tribunal, through a military order.⁵² Though structured on the Nuremberg model, the Tokyo Tribunal was different from an ordinary criminal court, as well as the Nuremberg Tribunal. It is argued that the Tokyo Tribunal was similar to a military commission or a court-martial. This tribunal tried only “Class A” war criminals of planners and perpetrators.

While the Nuremberg trials took one year, the Tokyo tribunal lasted for thirty-one months. The consequence of this length was the public ennui on the issue of crimes and war responsibilities. The Tokyo tribunal was widely criticized as being victors’ vengeance. According to U.S. Brigadier General Elliot Thorpe (who decided which high-ranking Japanese should be arrested as war criminals), “‘Class A’ trials were fundamentally an exercise in revenge. We wanted blood and, by God, we had blood.”⁵³ The Tokyo tribunal failed to provide an official publication of proceedings, unlike the Nuremberg Trials where court records were available in a forty-two-volume publication.

The court proceedings at Tokyo were also characterized by egregious procedural irregularities: the defendants were chosen on the basis of political criteria and their trials were generally unfair. “The execution of sentences was also inconsistent, controlled by the political whims of General Mac Arthur, who had the power to grant clemency, reduce sentences, and release convicted war criminals on parole.”⁵⁴

In Japan, as in Germany, the United States increasingly became preoccupied with the post-war politics rather than justice. American leaders did not wish a political vacuum to form that would create an opportunity for communism to proliferate. Thus, the prime force behind the Tokyo Tribunal was the future of an Asian policy based on maintaining Japan’s stability and strength. So the United States had to make sure that the Japanese did not feel humiliated by the consequences of the World War II. Hence, on 3 February 1950, General Mac Arthur reportedly decided to not prosecute Emperor Hirohito of Japan as a

⁵² Nyamuya, 101.

⁵³ John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, (W.W. Norton & Co. Press, 1999), 452.

⁵⁴ Nyamuya, 103.

war criminal. He felt that prosecuting the emperor would make the pacification of Japan a much more difficult task, costing the United States at the hands of Japan guerrillas.⁵⁵

D. CONTRIBUTIONS

The Nuremberg trials' objectives were meant to serve two ends: to render justice for all victims of Nazi aggression, and to educate the world about the unprecedented crimes of the third Reich. Many considered the Nuremberg Trials a great success despite the tensions caused by the different legal systems among four allies, the challenges of unknown types of crimes, the constraint of time, and the tension caused by two diverging aims: educating and prosecuting. The Nuremberg Trials not only produced a historical record of Nazism but also exacted justice. This feat was accomplished without disfiguring or defaming the law in the process. Many people including the Germans themselves believe that the trials at Nuremberg began a process of transformation. The association of that place and the crimes symbolized how justice can transform horror into hope. Furthermore, other people such as Smith have argued that “ the deliberations associated with the Nuremberg trial may well have forestalled a bloodbath.”⁵⁶ These trials indeed averted revenge acts that were expected given the degree of cruelty the Germans inflicted to the Jews and other population under German occupation in Europe during the WWII.

Another important legacy of the Nuremberg trials is international criminal law. It is on this model that the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal Court for Rwanda were founded.

In sum, apart from those unavoidable imperfections that characterized both the Nuremberg and Tokyo trials due to the diverging interests of the nations involved, those two tribunals were largely successful. They were punctual and managed to come to terms with the horrific events, achieved closure, and helped to rebuild healthy and stable societies. These trials were justified on the grounds that individual criminal accountability promotes reconciliation. Consequently, they served to highlight the moral claim that individuals and not groups are responsible for acts of violence. These tribunals

⁵⁵ Nyamuya ,104.

⁵⁶ Bradley F. Smith. *Reaching Judgment at Nuremberg*. (New York: Basic Books, 1963), 303.

also demonstrated that the protection of human rights was too important to be left to the individual states where the transgressions occurred. Finally, these tribunals created legal precedents that outlawed wars of aggression, war crimes against humanity.

E. JUSTICE IN SOUTH AFRICA

When Apartheid was abolished in South Africa in 1994, the majority black South African felt relieved. They hoped that justice will be provided and will help their sufferings to heal. However their first disappointment was in the creation of the TRC, which advocated for forgiveness and a form of amnesty instead of prosecution. People were expecting those who violated their rights to be punished. This section will analyze the challenges faced this new form of justice and its achievements.

The majority of South Africans were excluded from participating in the political and economical life of their nation for almost 350 years. Successive constitutions were used as instruments to consolidate white hegemony, excluding the vast majority of the population in terms of the color of the skin.⁵⁷ This system of apartheid, which was later declared a crime against humanity by the international community, did not only ensure privilege for a few, but also attempted to dehumanize from “cradle to grave” those excluded from such privilege. In 1994, South Africa achieved political liberation, with a changeover of government from the white minority to the black majority. It also marked the abolition of apartheid, and a year later, the South African parliament established the South African Truth and Reconciliation Commission (TRC). The objective of the TRC was to address the legacy of the past by promoting national unity and reconciliation that would contribute to the healing of the nation.

It is worthwhile noting the context in which the South African TRC was created in order to understand why the South Africans opted for a restorative form of justice and not a retributive type like in the Nuremberg case⁵⁸. Below are a few of the major factors that necessitated the two parties (the white and black communities) to compromise.

- A stalemate was reached (an equilibrium in the balance of forces) with neither side an outright victor
- A negotiated settlement ensued - not a revolutionary takeover

⁵⁷ Villa–Vicencio, 16.

⁵⁸ Ibid., 15.

- A fragile democracy and a precarious national unity
- The capacity of the outgoing regime, including the military and security forces that commanded huge resources, to delay or derail the process or at the very least, support and promote resistance to change.

Initially, the former government, supported by the international community, was calling for a blanket amnesty for all protagonists in the conflict of the past. But this was strongly opposed by the African National Congress (ANC). The debate was centered in two camps. The first camp consisted of the victims of violations who demanded that alleged crimes be avenged, while the second camp was made up of perpetrators seeking impunity by a way of blanket amnesty.

F. HOW DOES THE TRC PROCESS FUNCTION?

We have taken the concept of justice in its broadest sense and found a formulation that meets the specific requirements of our country-a formulation that contains a strong element of restorative justice, while limiting retribution to public exposure and shame to be faced by the perpetrators, whose names and deeds are becoming known: Former South African Minister of Transport, Mac Maharaj.⁵⁹

The TRC consists of three components, namely, The Amnesty Committee, The Human Rights Violations Committee, and The Reparations and Rehabilitations Committee. The Amnesty component works on the basis of a perpetrator-driven incentive of being given amnesty in return for full and truthful public acknowledgement of all the committed crimes. The bottom line is that the perpetrators must personally apply for amnesty; appear at public hearing; make a full confession; recognize the wrongfulness of the deed, in public; and acknowledge the truth. The crime is condemned legally and publicly and the report published with parties named. In this case, the full disclosure of a violation by the criminal replaces the need for punishment.⁶⁰ On the other hand, victims are also given opportunity to come forward in public and tell their stories in front of officials. These two aspects of truth telling and acknowledgment are said to be very crucial in the reconciliation and healing process.

⁵⁹ Villa–Vicencio, 25.

⁶⁰ Ibid., 27.

This achieved two goals: providing victims with a soft place to deal with hard issues, and proving perpetrators with a hard place to receive soft results.⁶¹

Although the form of justice is in essence restorative, it contains some elements of retributive justice in that truth is told, lies are exposed, and the perpetrators are publicly identified. Truth commissions presume that telling and hearing the truth is healing. Tina Rosenberg, a journalist immersed in the subject of collective violence in Latin America, Eastern Europe, and South Africa, finds parallels between truth commissions and the therapeutic process that helps individual victims deal with post-traumatic stress disorder.⁶² Similarly, Richard Mollica explains, “the trauma story is transformed through testimony from a story telling about shame and humiliation to a portrayal of dignity and virtue, regaining lost selves and lost worlds.”⁶³

While, the TRC process had been conceived to come to terms with the past through the national reconciliation, it has been widely criticized as being a total failure, and of missing a vision from the beginning. The TRC was conceptualized and legalized at a time when there was still significant concern about cementing the transition to democracy and facilitating peaceful relations between national political parties. The TRC did not take a proper approach of reconciliation. Instead of favoring a bottom-up approach that favors local communities’ initiatives and inputs, the TRC adopted a top-down approach that dictates from above. This approach has criticized as “ being at odds with the perceptions of reconciliation in many local communities, where local complexities were seen as factors that have to be addressed in their own right ”⁶⁴. The community members perceived the TRC as not showing sufficient interest in local dynamics. The TRC was further criticized for having failed to reach ‘real victims’ as Van der Merwe puts it: “Reconciliation is not about important individuals, but the common people need to reconcile. Prominent people were approached to make statements. Thousands of people who still have birdshots pellets lodged in their skin abound in

⁶¹ Villa-Vicencio, 25.

⁶² Martha Minow, *Between Vengeance and Forgiveness* (MA, Beacon Press, 1998), 62.

⁶³ *Ibid.*, 66.

⁶⁴ Hugo Van der Merwe, “National and Community Reconciliation: Competing Agendas in the South African Truth and Reconciliation Commission,” *Georgetown University Press*, (Washington, D.C., 2001), 91.

Duduza.”⁶⁵ He further argues that the approach to reconciliation is vague and lacks coherent vision of where it is taking people and is characterized by a poor out-reach strategy of communicating and involving the community. The communities need to be engaged in creating their own agenda for reconciliation and designing processes that allow local stakeholders to drive the process. Otherwise, failing to provide justice to people would be creating a ‘time bomb’ situation.

G. THE CASE OF SIERRA LEONE

In June 2000, the President of Sierra Leone officially requested the assistance of the United Nations to try those responsible for crimes against the people of Sierra Leone and for the taking of United Nations peacekeepers as hostages.⁶⁶ An agreement instituting a special Court was signed in April 2002 between the United Nations and the Government of Sierra Leone; and the said court started officially operating on 1 July 2002. This court was established as a hybrid body, meaning that it is part international and part national, combining local and international judges. The court is based in Sierra Leone, has primacy over Sierra Leone national courts and is independent from any government. The special court function is to try those who bear the greatest responsibility for prosecuting serious violations of international humanitarian law and the laws of Sierra Leone.⁶⁷ In March 2003, eight indictments were issued. On 22 February 2000 the Parliament of Sierra Leone also adopted a Truth and Reconciliation Commission (TRC). Although it is a national institution, the TRC has an international dimension due to the participation of the Special Representative of the Secretary General and the High Commissioner for Human Rights in its establishment.

These two United Nations Staff were responsible for recommending the appointment of the three members of the commission who are not citizens of Sierra Leone. Furthermore, the Commission’s mandate has both fact-finding and therapeutic dimensions. Though the TRC and the Special Court are now operational, their objectives are far from being achieved. This last section will look at possible obstacles that are hindering the success of these two projects.

⁶⁵ der Merwe, 88.

⁶⁶ William A. Schabas, “The Relationship between Truth Commissions and International Courts: The Case of Sierra Leone,” *Human Rights Quarterly* 25, (The Johns Hopkins University Press, 2003), 858.

⁶⁷ *Ibid.*, 1037.

1. The Special Court for Sierra Leone

A series of interviews the International Crisis Group (ICG) conducted in Sierra Leone in 2002 and 2003, revealed that there was a concern about whether the limited mandate of the court will allow those most responsible for crimes to be charged.⁶⁸ The Court's prosecutor, an American citizen, intended to indict a maximum of 30 persons whom he deemed bore the greatest responsibility.⁶⁹ Many Sierra Leonians argue that trying only the top commanders will not produce sufficient justice. To them, the most important are those lower ranking officials and foot soldiers whom they saw committing the atrocities.

Another complication is lack of security, which does not allow the Court to make a more direct and long last impact on the society where the atrocities took place. The proceedings are conducted behind closed doors, so the population remains uninformed about its actions. According to an opinion poll conducted by the Sierra Leone organization Campaign for Good Governance, ten percent of the population voiced their understanding of the court's purpose, forty-three percent expressed no understanding whatsoever, and 68 percent did not know the difference between the Special Court and the TRC.⁷⁰ Information on court proceedings reaches very few people, especially residents of towns, and is virtually non-existent in provinces where eighty per cent of people are illiterate.⁷¹ Moreover, funding is scarce, resulting in the court dependence on external donors to operate.

2. Sierra Leone Truth and Reconciliation Commission

Several factors that limited TRC chances of success included a limited time mandate of fifteen months, under funding, tensions between national and international members, and, above all, lack of political will. For those reasons the TRC in Sierra Leone has slim chances of succeeding. Like in the case of the Special Court, the population was ignorant of the TRC. For example interviews conducted by ICG found a large portion of the population believed wrongly that they would be paid if they testified to the

⁶⁸ "The Special Court for Sierra Leone: Promises and Pitfalls of a New Model," *ICG Africa Briefing*, (August 4, 2003), 10.

⁶⁹ *Ibid.*, 10.

⁷⁰ *Ibid.*, 17.

⁷¹ *Ibid.*

commission. Many expressed doubt about the need for a TRC, believing that Sierra Leoneans could simply forgive and forget, while others felt the TRC had no power to compel and punish, and therefore would serve no purpose.⁷² Another problem is lack of incentives to entice the perpetrators to testify. Unlike its South African predecessor, the Sierra Leone TRC has no power to grant amnesty.

In sum, for the TRC to achieve its objectives, the Government needs to step in, control and own the project. Both the TRC and the Special Court have not made any significant progress in providing justice to Sierra Leoneans. The country has failed to avail and guarantee conducive and necessary conditions such as security; to enable the processes of justice and reconciliation take place. In fact, if the government of Sierra Leone does not produce extra effort to maximize achievements in coordinating the two projects (TRC and Special Court), the latter would be bound to failure.

Furthermore, the local communities have to be involved in the formulation of policies and be informed of the progress and plans, otherwise the two institutions will make little to no impact on a Sierra Leonean war-torn society. However, these two enterprises have great potentials to initiate and achieve reconciliation. The fact that they mix prosecutions and therapeutic dimensions, give them greater chances to achieve healing and reconciliation.

⁷² The Special Court for Sierra Leone: Promises and Pitfalls of a New Model, 3.

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IV. POST-WAR JUSTICE IN RWANDA

A. INTRODUCTION

In the aftermath of genocide in Rwanda, justice does not present a good balance sheet especially as viewed by Rwandans at large. The carefully planned genocide of the Tutsi community by Hutu officials and their supporters has left a traumatized population, a demolished physical infrastructure, local courts overwhelmed by the sheer number of cases to prosecute, prisons full beyond normal capacity, and the International Criminal Tribunal for Rwanda (ICTR), that has failed to perform up to the expectations of both the international and Rwandan communities. This chapter analyzes the challenges of the Rwandan post-war justice system in the wake of the 1994 genocide by discussing the lack of prosecution of those accused of crimes against humanity and/or genocide. It also dissects the problems related to the incarceration of the accused and the sluggish justice process currently operating in the Rwandan courts. Lastly, this chapter explores the reasoning that supports the creation of the International Criminal Tribunal for Rwanda (ICTR).

B. THE CHALLENGES OF POST-WAR JUSTICE IN RWANDA

1. Overview of the Rwandan Justice System

After the horrors of the 1994 genocide in which over one million Rwandans were slaughtered, it was nearly impossible for the criminal justice system to cope with the sheer volume and complexities of such an ethnic cleansing. As a result of the civil war, genocide, and resulting exodus, few legal professionals of any kind remained in the country. Some fled, others died, and a percentage were even in prison, accused of leading or taking part directly in the violence or planning and setting events in motion. For instance, in late 1994, Rwandan Ministry of Justice Reports indicate that there were only 36 judges and 14 prosecutors available in the entire country. In and around Kigali (the capital city), only two government prosecutors were operating in that period.⁷³ Another report, produced by the World Bank in 1995, indicates that out of an estimated corps of 1,100 magistrates before the war, less than 200 magistrates had reported for duty after

⁷³ Charles Mironko, Visiting Fellow. "The Aftermath of Genocide: The Search for Justice and Reconciliation," *Watson Institute, Brown University*. (Providence, Rhode Island, 2003), 4.

order had been restored in the country. The judiciary infrastructure was also seriously affected. The Ministry of Justice had been severely damaged and looted of all its basic office supplies. The few investigators remaining also did not possess a single government vehicle for transportation in order to conduct their investigations and document evidence.

To complicate matters even further, the Rwandan prisons, built to accommodate relatively few numbers, were filled well beyond capacity. For example, the central prison in Kigali, initially designed for a maximum capacity of 1,500 prisoners, housed more than 5,000 in November 1994; and this situation was repeated throughout the country. Thousands of suspects of the 1994 massacres were being processed into prisons everyday. Amnesty International reported that, by the end of 1994, 92,000 people were detained, a figure that had swelled to reach 125,000 by the end of 1996. Many of them had not been officially charged with a crime and all were without a set trial date.⁷⁴ Farah Stockman commented that Rwanda had the densest prison population in the world.⁷⁵

At that time, the government of Rwanda faced tough internal challenges. The number of prisoners was increasing while limited investigative resources were minimal, reducing the speed of the justice process to a crawl. Among the 4,623 genocide suspects in Kigali prison, only 1,224 suspects had appeared before the magistrate in 1994. As Farah Stockman, renowned jurist contends, “at the current rate, it would take 150 years for the government of Rwanda to judge all the genocide suspects now in custody.”⁷⁶ While these internal challenges were mounting, international opinion also criticized the slow rate of prosecutions and the deteriorating conditions in prisons. The international community offered a few solutions to the government of Rwanda, but not a single suggestion was compatible with Rwandan principles and objectives. For instance, France offered to sponsor judges from the francophone countries to come and speed up the process of the genocide trials. However, the Rwandan government rejected this offer on the grounds of sovereignty issues. It argued that outsiders could not properly adjudicate

⁷⁴ “Amnesty International Report 1997: Rwanda: Ending the Silence.” (AI Index: AFR 47/032/1997, September 25, 1997), 1. Available from <http://www.amnesty.org/library/Index/ENGAFR470321997?open&of=ENG-RWA>. Accessed March 2005.

⁷⁵ Farah Stockman, “The People’s Court: Crime and Punishment in Rwanda,” *Duke University Press and the W.E.B. DuBois Institute*, (Durham, N.C., 2000), 1.

⁷⁶ Ibid.

the matter. When France was asked to provide funding to improve the conditions of the existing Rwandan prisons and for the construction of new prisons, the French government declined.

Soon after Rwanda was stabilized in 1994, the Ministry of Justice undertook the training of new magistrates and investigators to fill the vast shortfall. The pace was slow. In 1997, for example, 80-90% of the magistrates' positions were still vacant despite the 1994 training initiative, a staggering deficit when compared to the sheer number of potential cases awaiting trial. After extensive deliberation and input from a number of national experts and expatriates, the Rwandan government enacted legislation in 1996 to expedite the judicial process.⁷⁷ Known as the Organic Law Number 08/96 for the Organization and Regulation of the Prosecution of Genocide related Cases, this law created four levels of culpability for the genocide and crimes against humanity:

- The planners and leaders of the genocide, those in positions of authority who fostered these crimes, particularly notorious killers and sexual torturers.
- Others who killed.
- Those who committed other crimes against persons.
- Those who committed offenses against property.

All those in the first category were subject to full prosecution and punishment. The law created incentives for people in the two most numerous categories (2 and 3), who voluntarily came forward and confessed. The aim was to lighten some of the burden of preparing cases for prosecutors and investigators, thus making the number of remaining cases for prosecution more manageable. These incentives will be discussed in detail in Chapter V, as well as some of the amendments made on this law.

As a consequence of this legislation, the International Crisis Group (ICG) did report that the number of domestic genocide trials rose from 330 in 1997 to 600 in 1998⁷⁸ and they continued to rise steadily. From December 1996 to November 1998, those who had pleaded guilty to genocide and other human rights abuses numbered almost 10,000,

⁷⁷ This organic law can be found in the *Official Gazette of the Republic of Rwanda*, year 40, no. 6, (March 2001), 34.

⁷⁸ "Five Years after the Genocide in Rwanda: Justice in Question," (ICG Report Rwanda No. 1, 7 April 1999), 4.

with only 2,000 coming to trial in the same period. By January 2000, more than 2,500 people had been tried.⁷⁹ Looking at these figures of tried cases, in comparison to those awaiting trials in prison, one might not appreciate government efforts to deal with this enormous challenge. However by way of comparison, the Nuremberg trials, supported by over 900 allied personnel and about the equal number of Germans, hardly prosecuted 200 defendants. To put these numbers in perspective, Mr. Neil Kritz comments that the prospect of 100,000 genocide defendants unquestionably would overwhelm and incapacitate any developed including the United States, which has half a million lawyers, and an economy and population that are vastly larger than that of tiny Rwanda.⁸⁰

Rwanda had the additional responsibility of upgrading all aspects of its national institutions. The desperate state of Rwandan security, economy, agriculture, health, resettlement, and education, all of which required similar attention, made it difficult to concentrate exclusively or even primarily on justice issues. As a consequence, pressure mounted from the survivors of genocide who claimed that the government was dragging its feet. The international community also complained that prisoners continued to languish in prisons.

In an effort to deal with this justice backlog, the Rwandan Government carried out group trials. This required the creation of chambers in all twelve Rwandan provinces to expedite concurrent trials. Once again, it became clear that the 12 tribunals were insufficient to contend with the backlog of approximately 125,000 suspects and related trials.

In another attempt to reduce the backlog of the cases, the government passed a law in September 1996 stipulating that all arrested genocide suspects must have their files and testimonies in order by December 1997. The law also fixed the legal period of detention at six months. Furthermore, in August 1997, the Rwandan government decided to discharge those genocide suspects who had incurable disease (e.g., AIDS), or who

⁷⁹ “Amnesty International Report 1997: Rwanda, Gacaca; A Question of Justice,” (AI Index: AFR 47/007/2002, December 17, 2002), 17. Available from <http://web.amnesty.org/library/Index/ENGAFR470072002?open&of=ENG-RWA>, Accessed March 2005.

⁸⁰ Neil J. Kritz, “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violence of Human Rights,” *Law and Contemporary Problems*, Vol. 59, No. 4, Accountability for International Crimes and Serious Violations of Fundamental Human Rights, (Duke University School of Law, Autumn 1996), 150.

were elderly or minors during the genocide. In 1998, a second controversial decision of the Ministry of Justice released nearly 10,000 genocide suspects who did not have fully prepared case files.

However, this gesture toward leniency was frequently criticized. Some suggested that this policy was part of a government effort to win votes in the upcoming elections, as well as an attempt to deflect criticism from the international community. The survivors' association *IBUKA* was most critical. It expressed disappointment concerning the judicial institutions arguing that such measures were not helping to eradicate the culture of impunity but rather reinforcing it. The fact that certain suspects did not have up- to- date case files hardly constituted grounds for release and their making make those suspects innocent.

The aftermath of the Rwandan genocide presented further tough choices and offered very limited acceptable options to the government in its attempt reconcile Rwanda's future with its past. This is seen in its effort to rebuild the justice system in order to create conditions for social development and harmony while at the same time, confronting the appalling poverty of the population and the country's lack of financial means. The challenge of reconstructing the justice system while dealing with thousands of case files for genocide suspects was enormous, even for countries with robust justice systems with resources. Added to this, was Rwanda's overall state of destruction. According to Mr. Charles Mironko, the dilemma, therefore, lies in reconciling the unspeakable situation of the genocide suspects (mostly Hutu) in prisons and the demands of survivors and the legacy of up to one million victims (mostly Tutsi) tortured, killed, raped robbed, and humiliated by the very same prisoners.⁸¹

2. The Establishment of International Criminal Tribunal of Rwanda (ICTR)

When the 1994 genocide in Rwanda was stopped, it left the country with a shattered judiciary system that had the responsibility of dealing with the huge challenge of trying those who committed the atrocities. To make matters worse, the majority of senior planners and perpetrators had fled the country and, hence, were beyond

⁸¹ Charles Mironko, Visiting Fellow, "The Aftermath of Genocide: The Search for Justice and Reconciliation," *Watson Institute, Brown University*. (Providence, Rhode Island, 2003), 10.

apprehension and prosecution by the Rwandan authorities. Consequently, many believed that only an international tribunal possessed the necessary human and material resources at its disposal to provide justice in the complex and vast Rwandan legal situation. An international tribunal also stood a better chance than did local courts in securing the physical custody and extradition of those suspects abroad. On November 8, 1994, having determined that the genocide and other systematic, widespread, and flagrant violations of international humanitarian law committed in Rwanda constituted a threat to international peace and security within the scope of Chapter VII of the United Nations (UN) Charter, the Security Council adopted Resolution 955. This supplied the legal foundation for the International Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the territory of Rwanda, those responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, and December 31, 1994⁸². This section assesses whether or not the ICTR has attained its objectives since its genesis by reviewing the achievements, shortcomings and future prospects of this tribunal.

3. The ICTR

The United Nations Security Council (UNSC) reluctantly passed a resolution establishing the ICTR on November 8, 1994, as requested by the Government of Rwanda. However, the passing of this resolution was a near-run thing. Debate revolved around whether the murderous acts in Rwanda were really genocide, or simply widespread indiscriminate behavior of sub-genocidal massacres holding lesser connotations. Given the reluctance to intervene that characterized the behavior of international community during the massacres, it was clear that, had the sequence of events between the Yugoslav and Rwanda conflicts been different, it is by no means certain that a tribunal for Rwanda would have been established.

On the basis of international responses to other situations, it has been suggested that the plight of African victims would not have generated the same outcry as the suffering of Europeans. In other words, the ICTR was established because of the precedential effect of the Yugoslav Tribunal.

⁸² "UN Doc. S/1994/1125," from para. 148. Available from <http://daccessdds.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement>, Accessed March 2005.

Others have suggested that it is the miasma of guilt, of having failed to intervene before and during genocide in Rwanda that hovered over Western governments to vote for the creation of the ICTR.⁸³

During the UN deliberations to establish the ICTR, the UNSC considered three options:

- Expansion of the mandate of the existing tribunal for the former Yugoslavia to include Rwanda.
- Creation of a wholly separate entity under UN auspices, with its own charter, judges, personnel, facilities, etc.
- Creation of a separate Rwanda tribunal, but sharing an administrative staff, facilities, and other resources with the Yugoslavia panel.

A combination of the three possibilities was adopted. The ICTR was established as an independent entity, with its own judges, registry system, and administrative staff. However, the same persons who served as Chief Prosecutor and appeals judges for the International Criminal Tribunal for Yugoslavia (ICTY) would execute those functions for the Rwanda Tribunal. The ICTR would adopt the rules of evidence and procedure that were developed for the ICTY. Although the intentions were good, this kind of arrangement based on concessions was bound to create problems and contradictions, as Professor M.C. Bassiouni notes:

The choice of a single Prosecutor was particularly ill advised because no person, no matter how talented, can oversee two major sets of prosecutions separated by 10,000 miles. The idea that one can shuttle between The Hague, Netherlands and Arusha, Tanzania as part of normal work schedule is nothing short of absurd.⁸⁴

It is worthwhile noting that the Rwandan government, having championed the establishment of the ICTR, eventually voted against Resolution 955.⁸⁵ Rwanda initially had envisaged that the Tribunal would be under its national jurisdiction, thereby giving the government sovereign protection and avoiding manipulations by States with ties to

⁸³ Payam Akhavan, "The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment," *The American Journal of International Law*, Vol. 90, No. 3 (July 1996), 501.

⁸⁴ Nyamuya, 188.

⁸⁵ "UN Doc.S/PV.3453," from 11 (1994). Available from: <http://daccessdds.un.org/doc/UNDOC/PRO/N94/869/74/PDF/N9486974.pdf?OpenElement>, Accessed March 2005.

the previous regime. Rwandan government dissatisfaction and the dissatisfaction with the Resolution and the Tribunal's Statute, ultimately came to be based on the following reasons:

- The Rwandan Government was of the view that the temporal jurisdiction of the Tribunal was too restrictive, i.e., Covering only the period between January 1, 1994 and December 31, 1994. The argument was that the genocidal acts committed in 1994 had not occurred spontaneously but had been preceded by pilot projects for extermination dating from the beginning of the armed conflict in October 1990.⁸⁶ The argument elaborated that an international tribunal, which refused to consider the causes of genocide in Rwanda and its planning, could not be of any use because it would not contribute to eradicating the culture of impunity or creating a climate conducive to the national reconciliation.⁸⁷
- The Rwandan Government deemed that the composition and structure of the Tribunal was inappropriate and ineffective, given the magnitude of the task awaiting the staff of the Tribunal and the need for speedy and exemplary action by the Tribunal. The Rwandan Government had requested that the number of Trial Chamber judges be increased, and that the Tribunal be given its own Appeal Chamber and prosecutor (instead of sharing with Yugoslavia).
- The Rwandan Government believed that certain countries had proposed candidates for judges, and at the same time, they had participated in their election despite the fact that the countries took a very active role in the politics of intervention that surrounded the genocide in Rwanda.
- The Rwandan Government was opposed to imprisoning those condemned outside Rwanda and giving other countries the authority to reach decisions about the detainees. It argued that this authority should remain with the International Tribunal, if not with the Rwandan Government, to avoid a situation in which the perpetrators would be freed.
- The Rwandan Government objected to omission of the death penalty, which is provided for in the Rwandan penal code.
- The Rwandan Government argued that, in order for the Tribunal to achieve the desired effect of "teaching the Rwandan people a lesson, to fight against the impunity to which it had become accustomed ... and to

⁸⁶ "Amnesty International Report 1997: Rwanda, Gacaca; A Question of Justice," (AI Index: AFR 47/007/2002, December 17, 2002), 8-9. Available from <http://web.amnesty.org/library/Index/ENGAFR470072002?open&of=ENG-RWA>, Accessed February 2005.

⁸⁷ "UN Doc. S/PV.3453," from 14 (1994). Available from <http://daccessdds.un.org/doc/UNDOC/PRO/N94/869/74/PDF/N9486974.pdf?OpenElement>, Accessed March 2005.

promote national reconciliation,”⁸⁸ the Tribunal’s seat should be located in Rwanda unlike in the former Yugoslavia where the location of the Tribunal’s seat was not an option because the war was still raging and the insecurity would not allow it to operate. Despite the fact that the war had been over for approximately four months ago, some argued that in addition to the dilapidated infrastructure, “...it would be difficult for the UN staff to operate in the early throes of clearing the dead...”⁸⁹ This decision reflected poorly on a so-called humanitarian organization, which, after abandoning people to be slaughtered, refused to operate in areas of the country infused with the stench of decaying bodies.

In addition, Rwanda’s social, cultural and political environment was not taken into consideration when the ICTR was planned and established. The result, therefore, did not completely address Rwanda’s circumstances. Furthermore, tribunals organized under separate auspices threatened to produce contradictions in international law. Rwanda and Yugoslavia offered the two cases, since the post-World War II war crime trials in Nuremberg and Tokyo, in which such an international tribunal was currently functioning. As was true of the earlier proceedings, the tribunal’s interpretation and application of evolving international norms would affect this field for years to come. Wholly separate tribunals in Yugoslavia and Rwanda could well arrive at conflicting interpretations of these international norms, putting them in contradiction and undercutting their credibility. Rather than clarifying and strengthening international standards, the result of “dueling” tribunals could add confusion to an area of law that was already somewhat uncertain and lacking in precedence. On the other hand, use of a single appeals chamber for both tribunals would ensure that these evolving international norms would be interpreted and applied consistently by both of these bodies.

Potential procedural contradictions of a dual tribunal system were also problematic. Aside from generating inconsistencies in substantive international law, completely separate tribunals would potentially develop two dissimilar coordination mechanisms of investigations, rules of procedure, and standards of evidence. These disparities would raise questions of fairness and possibly negative comparisons between the tribunal established for a European case and one created with an African focus. It is

⁸⁸ “UN Doc. S/PV.3453,” from 16 (1994). Available from <http://daccessdds.un.org/doc/UNDOC/PRO/N94/869/74/PDF/N9486974.pdf?OpenElement>, Accessed March 2005.

⁸⁹ Kirtz, 131.

however, important to note that the Statute of ICTR sought to eliminate procedural dissonances. It stipulated that the judges of ICTR shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of ICTR with changes as they deem necessary.

The ICTR and Rwandan courts were given concurrent jurisdiction. This was necessary to determine where each would place its emphasis. The ICTR would follow the precedent set by the Nuremberg trials, hearing cases against a smaller number of principals responsible for the genocide. It would focus on senior leaders of the former government, military, and militias, and representatives of other segments of Rwandan society implicated in atrocities, such as the clergy.

Prosecutions before domestic courts, on the other hand, would enhance the legitimacy of the Rwandan government and of the judiciary, be more sensitive to nuances of local community, emphasize that Rwanda society would henceforth hold individuals accountable for their crimes, and stress a local alternative to vigilante justice. A key purpose of the UN Tribunal as described by the Commission of Experts is unquestionably the “coherent development of international criminal law to better deter such crimes from being perpetrated in future not only in Rwanda but anywhere.”⁹⁰ More immediately, however, the tribunal was to provide Rwandans with a message and a visible image that justice is being accomplished, and that the atrocities in Rwanda are being addressed within the framework of the law. This public display through the trials was vital to exorcise the long-entrenched culture of impunity, achieve a degree of reconciliation, stem vigilante acts of retribution, facilitate a return of refugees, and deter a new wave of violence. However, the position of the tribunal undermined these objectives. Nor has it had a public impact on the people of Rwanda, as did the Nuremberg trials in Germany, as detailed below.

4. Achievements

Despite the long list of limitations associated with the ICTR, there have been some notable advancement in addressing some of the many concerns. These include:

⁹⁰ Eric David, Pierre Klein and Rosa Anne-Marie Law, *International Criminal Tribunal for Rwanda Reports of Orders, Documents and Judgments*, (Bruylant, Belgium 2000), 1063.

- The appointment of a separate prosecutor and ad hoc judges for the ICTR. The United Security Council (UNSC), in a bid to improve on the pace of the ICTR trials, decided to establish a separate prosecutor for the ICTR and also elected a panel of 18 ad hoc judges.⁹¹ (the International Criminal Tribunal for the ex-Yugoslavia- ICTY and the ICTR had been overseen by one prosecutor based in The Hague)
- Initiatives taken by the new President of the Tribunal to expedite the pace of trials and to promote the effective functioning of the tribunal. In fact, Judge Erik Mose who was elected the new president of the ICTR in May 2003, started four new trials, submitted a completion strategy to the UNSC and increased the number of ad litem judges (for a term of four years without reappointment rights) from four to nine.⁹²
- The Tribunal has apprehended a handful of high-profile suspects, which the Rwandan Government would not have been able to for various political reasons. From personal experience, many of the genocide suspects are hiding in countries where the Rwandan Government cannot access them due to a lack of extradition treaties. Other countries, which had close ties with the genocidal regimes, such as France, are protecting the suspects, making difficult, if not impossible, for the Rwandan Government to reach them. Hence, the hope has been on the ICTR to use its power under chap VII.
- The ICTR has many other accomplishments including the first contemporary conviction for genocide by an international court in the case of Paul Akayezu and the indictment, arrest, and guilty plea of former Prime Minister Jean Kambanda for crimes against humanity and genocide. This prosecution reinvigorated the effort to bring Augusto Pinochet to trial. The Akayezu case contributed to the establishment of the precedent that the systematic commission of rape be included in the crime of genocide.

5. Shortcomings of the ICTR

The failure of the ICTR to fulfill expectations was entirely predictable. Its failures included:

- The ICTR is remote and alienated from Rwandan society. It has failed to have any significant impact on Rwandan society as envisaged in the UNSC Resolution 955, which established the Tribunal. The Rwandan populace receives little to no information on Tribunal activities and accomplishments. In addition, the ICTR has failed to generate international press coverage of its operations.

⁹¹ Document available from:
<http://daccessdds.un.org/doc/UNDOC/PRO/N04/407/96/PDF/N0440796.pdf?OpenElement>. Accessed March 2005.

⁹² The new president of ICTR interviewed by Hirondelle News. Available from:
<http://wwwhirondelle.org:20.01.04> Accessed March 2005.

- The Tribunal's management organs have worked as unrelated institutions lacking cohesion rather than being complementary organs of the same institution working in close cooperation. The American war crimes Ambassador Pierre-Richard Prosper expressed disappointment over the court's lack of professionalism, mismanagement, and the slow and slumbering pace of prosecutions.⁹³
- The Tribunal has under performed, especially given its high profile and ample resources. It has a yearly budget of roughly \$100 million.⁹⁴ Yet, it has achieved minimal results:
 - Only 19 cases have been completed, the last in December 2003.
 - There are a mere 17 detainees on trial.
 - Only 30 detainees are pending trial.
 - There are only 56 detainees in Arusha, with six serving sentences in Mali.⁹⁵
- The ICTR has failed to develop a credible and effective witness protection program, and has neglected to address other pertinent concerns and needs of victims and witnesses, as testified by the open letter of the Rwandan women's association to the ICTR Chief Prosecutor.⁹⁶ For example, Bosco Nyemazi, a confessed genocide killer, was murdered on October 12, 2004 shortly after his return from testifying at the ICTR headquarters in Arusha. The Rwandan officials highly suspected a connection between the murder and the ICTR investigators.⁹⁷
- The ICTR has hired perpetrators of genocide and close relatives and friends of suspects as defense investigators and legal assistants, who allegedly threaten genocide survivors tapped as prosecution witnesses. In 2001, three of the ICTR defense investigators who had been working under different names, were found to be suspects in the 1994 genocide. These are Augustin Basebya, Aloys Ngendahimana, and Augustin Karera.⁹⁸
- It has been accused by genocide survivors' groups as being insensitive to the sufferings of witnesses, especially the victims of rape. In January 2002, the survivors' groups such as *IBUKA* and *AVEGA* (*Association des Veuves du Genocide d'Avril*: Association of April Widows), refused to

⁹³ The new president of ICTR interviewed by Hirondelle News.

⁹⁴ Ibid.

⁹⁵ ICTR Detainees, status in December 24 Report.

⁹⁶ The open letter available from [http://www.dd-
rd.ca/english/commoc/publications/women/womtrirw.html](http://www.dd-rd.ca/english/commoc/publications/women/womtrirw.html), Accessed March 2005.

⁹⁷ <http://www.horondelle.org:10.11.04>. Accessed March 2005.

⁹⁸ <http://news.bbc.co.uk/2/hi/africa/1442432.stm>. Accessed March 2004.

cooperate with the Tribunal, stating that their members would not testify before “people who ridicule us and treat our suffering as a banality.”⁹⁹

- There have been constant reports of fee-splitting arrangements between genocide suspects in detention and defense lawyers. One result is that financial contributions made by the international community to bring to justice the perpetrators of genocide are instead used to enrich the criminals and their families and friends. For example, some detainees at the ICTR solicit between US \$2,500 to 5,000 per month from their defense teams.¹⁰⁰

6. Future Prospects

The ICTR was slated to have completed investigations by 2004 and clear the docket by 2008. However, owing to the sluggish pace of proceedings, coupled with frequent and long interruptions of trials, there is little hope that this will be accomplished. Nevertheless, the Rwandan Government has initiated negotiations with the Tribunal in order to transfer all the detainees who are waiting prosecutions from Arusha to Rwanda. The ICTR has already finished surveying detention facilities in Rwanda with the view of improving their conditions.

Those transfers of the remaining cases to Rwanda will contribute a great deal to boosting the national courts’ prestige and credibility. Moreover, trials conducted at the scene of the crimes would produce a direct positive impact on the victims of genocide in Rwanda. They would certainly contribute to the mental health of the victims of genocide, impact the Rwandan economy, and by helping to bring closure to the most horrific episode in the region’s history, contribute to the political stability of the Rwandan Nation.

C. CONCLUSION

This chapter has analyzed the challenges inherent in post-war justice in Rwanda. The main concerns include the prosecution of crimes against humanity and genocide, and the associated problems of incarceration and the slow pace of justice in Rwanda. This chapter also has analyzed the difficulties and successes of the International Criminal Tribunal for Rwanda. Unfortunately, the ICTR, established to try the perpetrators of genocide, has failed adequately to its obligations to the satisfaction of Rwandans and the international community. In an effort to fill this void, the government of Rwanda has

⁹⁹ Amnesty International, Rwanda, Gacaca: A Question of Justice, 10.

¹⁰⁰ “BBC Monitoring Africa- Political.” London: March 14, 2002, 1. Available from <http://proquest.umi.com/pqdweb?index=2&did=110444191&SrchMode=1&sid=1&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1111129838&clientId=11969#fulltext>, Accessed March 2005.

established mechanisms to address the consequences of the genocide, while at the same time pushing the United Nations Security Council and the ICTR to establish an equitable solution. It is hoped that such cooperation will help the ICTR complete its obligations and create a conduit so that the ICTR can eventually delegate any remaining and unfulfilled responsibilities to the Rwandan justice system.

V. THE GACACA JUSTICE SYSTEM

A. INTRODUCTION

Courts try cases – but cases also try courts.

Judge Robert Jackson, the Chief Prosecutor at the Nuremberg Tribunal.¹⁰¹

The genocide-related cases taken up by the ICTR and the Rwandan national courts have certainly strained these traditional institutions of law and both have been found wanting. While the ICTR has made important strides for international humanitarian law, including the first conviction of rape as a war crime, in general it has not met the needs of the Rwandan people. The national legal system of Rwanda has also been overwhelmed by the sheer number of cases and so has failed adequately to administer justice after the genocide, hence prompting the government to resort to and modify an alternative justice mechanism called *Gacaca*. In their article, Peter Uvin and Charles Mironko concluded that “Gacaca may remedy the slow pace of current judicial practice, and also has the potential to create significant benefits in terms of truth, reconciliation, and even grassroots empowerment.”¹⁰² Many claim that this community-based dispute resolution system will bring expeditious justice, healing, and reconciliation. This chapter will discuss Gacaca’s adaptation to the conditions of post-genocide Rwanda. It will look at its strengths and weaknesses in bringing justice after the genocide of 1994.

B. DEFINITION OF GACACA

Gacaca is a corruption of a word for a variety of grass common in Rwanda, called *umucaca*. Long before the colonial period, the word signified both a meeting and a meeting place used by village elders for solving problems amicably or trying to mediate a conflict while sitting on Gacaca-covered ground.¹⁰³ In pre-colonial Rwanda, there were two ways of resolving conflicts. In the first, the king ordered people to forget or avoid

¹⁰¹ Helena Cobban, “The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law,” *Bostonian Review*. (May 2004), 8. Available from <http://www.bostonreview.net/BR27.2/cobban.html>, Accessed January 2005.

¹⁰² Peter Uvin and Charles Mironko, “Western and Local Approaches to Justice in Rwanda,” *Global Governance Research Library* 9 (2003).

¹⁰³ Mironko, 20.

revenge between parties to a conflict, in order to preserve social unity. The second means was through Gacaca, traditionally used at the local level to resolve disputes. In Gacaca proceedings, respected community figures served as “judges” during the dispute resolution process. Typically, Gacaca considered disputes around inheritance, civil right, and conjugal matters. All cases had first to be taken to the council of elders before they were forwarded to the attention of the king, who only intervened to resolve the most difficult issues.

The Gacaca, similar to nearly all systems of traditional law, was part of the Rwandan culture. It was established upon principles of morality and reverence for life. As such, it cannot be examined in isolation, but has to be placed in a wider context of the customs and organization of a society so as to understand its meaning within the context of practices and beliefs.¹⁰⁴ Thus, Gacaca was a traditional system used to settle social or economic conflicts between one or more families usually within the same village. The system of family organization determined the composition of Gacaca and its *modis operandi*. The basic structure of Gacaca included a council of elders, and adult members of the community.

All members of a family lineage were placed under one head of that family lineage. Being the most senior member (in age), the head of the family lineage was designated by his father before the latter’s death. The importance and powers of the head of family in relation to the latter were comparable to the king’s role in relation to the nation. The head of family served as judge, lawyer, administrator, and conflict regulator of his group.¹⁰⁵ The principle behind each judgment was the restoration of social order and harmony rather than the imposition of punitive measures. The council of elders in any community was composed of heads of families, who used their authority to resolve disputes by rendering justice to achieve the restoration of order, the reintegration of the offender, and the reconciliation of the affected parties. The function of judge was sacred.

¹⁰⁴ Charles Ntampaka, “Le Gacaca Rwandais, Une Justice Repressive Participative,” *Actualité du Droit International Humanitaire*, (La Charte, 2001), 214.

¹⁰⁵ Ibid.

He acted in the name of his ancestors and of god. Moreover, these elders had coercive means in the unusual case where someone refused to obey the decision of Gacaca. Severe punishments included banning the criminal from the community.

Gacaca denotes two features: an active role assumed by the people to create legal norms, and a conciliatory dimension in the decision - making. Taking someone to Gacaca was the last resort in resolving conflict, since amicable resolutions were the preferred path.

C. PEOPLE CREATING THEIR LAW

The Rwandan culture was characterized by ethical traditions, meaning a system of moral rules, derived from people's daily customary practice that became binding obligations because they were necessary to the group's survival. As one writer notes, these obligations achieved authority that is equivalent to the "force of law".¹⁰⁶ Thus, unjust norms never existed for they always expressed the people's will and the requirement for social cohesion and survival.

Gacaca did not have regulations on pre-established procedures. Rather, the organization and procedures followed kinship structures that had no fixed venue. For example, a Gacaca hearing could take place in the open on the grass (*umucaca*), in a house, under a tree or anywhere else decided by the person who called Gacaca.¹⁰⁷ Gacaca was much more flexible regarding the imperatives of the collective security and the return to social harmony, meaning that it could be tolerant in those cases that risked creating discord and disunity in family or society. The decision was respected not because it was a legally binding decision, but because it ended a disorder and allowed the reestablishment of a disrupted social order.

D. THE CONCILIATORY ASPECT OF GACACA JUSTICE

In a traditional trial, there was no winner or loser. Everybody had to feel that he was not only gaining, but also losing. However, the family was always the winner because the decision would result in reconciliation. There was always an obligation to tell the truth, as illustrated by the Rwandan saying/principle: "*aho kuryamira ukuri*

¹⁰⁶ Mark R. Amstutz, *International Ethics, Concepts, Theories, and Cases in Global Politics*, (Rowman & Littlefield Publishers, 1999), 48.

¹⁰⁷ Mironko, 20.

waryamira ubugi bw'intorezo” meaning literally that, instead of hiding the truth, one would rather be beheaded.¹⁰⁸ The constant focus on finding a conciliatory judgment required the traditional judges to favor socialization in lieu of punishment. Most decisions involved affordable reparations being paid by one party to the other. To seal the deal, local beer was usually shared among the participants.

Gacaca took various forms during the colonial era, in the post-independence movement, and through the post-genocide period. The following sections of this paper will focus primarily on the post-genocide Gacaca.

E. THE POST-GENOCIDE GACACA

The idea of modifying traditional Gacaca for the purpose of judging genocide crimes is an innovation of the Rwandan government. According to Michel Moussalli, a well-known human rights activist:

It is the credit of the Rwandan authorities that...they do not hesitate to innovate and to try new approaches when it appears that the one at hand is not working at all or adequately. The current effort to institute gacaca jurisdictions alongside the conventional ones must be seen in this light.¹⁰⁹

The first discussions of using Gacaca justice to try genocide related cases started in 1995. The international community and human rights groups were, however, very skeptical that Gacaca would fail to protect defendants' rights. However, despair over the ever-increasing prison population caused by the slow pace of justice pushed the Government of Rwanda to explore the idea of Gacaca despite concerns. Also, the government managed to convince international donors towards the end of 1999 that Gacaca offered a solution to the problem of slow justice.

F. STRUCTURE AND WORK OF THE GACACA COURTS

The Rwandan Parliament passed the Organic Law 40/2000 in December, 2000, usually referred to as the Gacaca law. This law established nearly 11,000 Gacaca jurisdictions and empowered them to try genocide related suspects. Amended in 2004, the new Organic law, number 16/2004 of 19 June, 2004,¹¹⁰ established the organization, competence and functioning of Gacaca courts and is charged with prosecuting and trying

¹⁰⁸ Ntampaka, 216.

¹⁰⁹ Villa-Vicencio, 75.

¹¹⁰ The Organic Law was printed in *Journal Officiel No. Special du 01/05/2004* (Rwanda), 45.

the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994. These crimes of genocide are divided into three categories.

1. First Category

- The person whose criminal acts or criminal participation places him or her among planners, organizers, imitators, supervisors and ringleaders of the genocide or crime against humanity, together with his or her accomplices.
- The person who, at that time, was in the organs of leadership, at the national level, at the level of Prefecture, Sub-prefecture, Commune, in political parties, army, gendarmerie, communal police, religious denominations or in militia, has committed these offenses or encouraged other people to commit them together with his or her accomplices.
- The well known murderer who distinguished himself or herself in the location where he or she lived or wherever he or she passed, because of the zeal which characterized him or her in the killings or excessive wickedness with which they were carried out, together with his or her accomplices.
- The person who committed acts of torture against others, even though they did not result in death, together with his or her accomplices.
- The person who committed acts of rape or acts of torture against sexual organs, together with his or her accomplices.
- The person who committed dehumanizing acts on a dead body, together with his or her accomplices.

2. Second Category

- The person whose criminal act or criminal participation place them among killers or who committed acts of serious attacks against others, causing death, together with his or her accomplices.
- The person who injured or committed other acts of serious attacks with the intention to kill them, but who did not attain his or her objective, together with his or her accomplices.
- The person who committed or aided in committing other offences to people, without the intention to kill them, together with his or her accomplices.

3. Third Category

- The person who committed offenses only against property. However, if the author of the offence and the victim have agreed on their own, or before the public authority or witnesses on an amicable settlement, he or she cannot be prosecuted.

The organic law stipulates that the Gacaca courts have jurisdiction over suspects in the second and third categories. The first category suspects are tried before ordinary courts, which apply common law content, and procedure rules subject to exceptions provided for by the organic law.¹¹¹ The Gacaca jurisdictions are divided into three categories. These are:

- The jurisdiction for the Gacaca court for the cell¹¹²
- The jurisdiction for the Gacaca court of the sector
- The jurisdiction of the Gacaca court of appeal in each sector

Rwanda has approximately 9,500 cells, and above them, there are 1,550.¹¹³ Gacaca jurisdictions consist of three main divisions at the cell and sector levels: the General Assembly, the Seat, and the Coordinating Committee. At the cell level, the General Assembly comprises all the inhabitants aged 18 and above. This General Assembly elects nine persons of integrity among its members, otherwise known as *Inyangamugayo*, constituting the seat and five deputies.¹¹⁴ These nine persons then elect among themselves, with a simple majority, the coordination committee made up of a President, a first Vice President, a second Vice President and two secretaries, all of whom must know how to read and write *Kinyarwanda*, the national language of Rwanda.

At the sector level, the same procedure is done twice to cater to both the Gacaca Court of Appeal and the Gacaca Court of the Sector.¹¹⁵ The following cannot be elected a member of the Seat for Gacaca Court:

- A leading figure of a political party.
- A person in charge of a centralized or decentralized government administration.
- A soldier or policeman who is still on active service.
- A career magistrate.
- Anyone on the official list of genocide suspects.

¹¹¹ *Journal Officiel*, 34.

¹¹² Administratively, Rwanda is divided into provinces, the latter are sub-divided into districts, sectors and cells, being the smallest administrative units.

¹¹³ Harrell E. Peter, *Rwanda's Gamble Gacaca and a New Model of Transitional Justice*, (NY: Writers Club Press, 2003), 70.

¹¹⁴ *Journal Officiel*, 36.

¹¹⁵ *Ibid.*

In addition, a member of the seat for the Gacaca Court cannot judge or decide on a case in which he or she is a party or is prosecuted. Before exercising his or her duties, every member of the Seat for the Gacaca Court must take an oath.¹¹⁶ Note that these Gacaca courts do not replace the Rwandan formal courts or the ICTR trials. They will work in parallel with speed and reconciliation.

G. INCENTIVES AND PENALTIES

The organic law stipulates that defendants falling within the first category who refused to confess plead guilty, repent and apologize, or whose confessions, guilty plea, repentance and apologies have been rejected, incur a death penalty or life imprisonment.¹¹⁷ The same law, however, stipulates that defendants falling within the first category, who confessed, pleaded guilty repented and apologized, incur a prison sentence ranging from 25 years to 30 years of imprisonment. Second category defendants who refused to confess incur a prison sentence ranging from 25 to 30 years of imprisonment, while those who confessed get their sentence reduced from 12 to 15 years of imprisonment, out of which they serve half in custody while the rest is commuted into community services on probation. The remaining defendants with lesser crimes, who confessed, get sentences varying from a maximum of five years to a minimum of one year of imprisonment. Half the sentence is served in custody and the rest is commuted into community services on probation. Moreover, defendants who committed offences relating to property are only sentenced to the civil reparation for that which they have damaged.

H. EXPECTATIONS AND CHALLENGES

The government of Rwanda hopes to achieve the following main objectives in adapting Gacaca courts for genocide trials:

- To eradicate the culture of impunity. The government hopes that by involving the population in all phases of the trials (investigation, prosecution, deliberation...), it will be easier to implement such a system and also gain acceptance in enforcing the crime of genocide.

¹¹⁶ *Journal Officiel*, 35.

¹¹⁷ *Ibid.*, 52.

- To speed up genocide trials. In the absence of any alternative from conventional or western models, it looks to ease the backlog of the sheer number of prisoners. In this respect, Gacaca courts present a realistic hope that the backlog can be cleared by concurrently holding trials throughout all the cells.
- To establish the truth of what happened during the genocide. Genocide was committed by the population or was committed in their presence. Thus, involving them is the only way to know the truth.
- To reconstruct the Rwandan society. The participation of individuals is designed to build and strengthen communities as well as to empower the population. The Gacaca system requires people within the communities to work as voters, witnesses, tribunal personnel, and jurors. It creates a common experience in which everyone works together toward a common goal. This participatory process promotes national democratic and rule of law values, as well as it shifts from the central government to the people. Also, punishing the guilty, restoring the victims' rights, and ending the culture of suspicion will promote morality, social cohesion and harmony that in turn will lay down a strong foundation for the reconstruction of Rwandan society.

The anticipated participation of the *Gacaca* actors appears in Table 2.¹¹⁸

Table 2. Anticipated Participation of the *Gacaca*.

	Prosecution Witness	Defense witness	Prosecution and defense	Spectator	Judge	Abstention
Survivors	48%	1%	1%	23%	25%	2%
Prisoners	28%	28%	33%	9%	...	2%
Population	11%	9%	3%	44%	23%	10%
Butare	25%	11%	0%	41%	18%	5%
Byumba	6%	5%	0%	42%	29%	19%
Cyangugu	12%	8%	9%	42%	18%	11%
Gikongoro	22%	12%	1%	41%	20%	4%
Gisenyi	14%	15%	0%	25%	33%	13%
Gitarama	8%	12%	7%	43%	22%	8%
Kibungo	13%	10%	1%	50%	20%	7%
Kibuye	6%	6%	17%	36%	26%	8%
Kigalingali	8%	8%	0%	49%	26%	9%
MVK	6%	6%	2%	60%	11%	16%
Ruhengeli	9%	12%	2%	39%	24%	14%
Umutara	5%	4%	0%	61%	22%	8%

¹¹⁸ National Unity and Reconciliation Commission (N.U.R.C). *Republic of Rwanda, Opinion Survey On Participation in Gacaca and National Reconciliation*, (Kigali: Imprimerie Printer Set, January 2003), 10.

The data in the above table is reflected in an opinion survey that was conducted in Rwanda from July 8 to August 12, 2002. The population numbers involved are estimated at more than 7 million for the general population, 400,000 survivors and 110,000 persons on preventive detention, on charges related to genocide and crimes against humanity. The survey methods and techniques are based on samples selected randomly and without restrictions among the population basin.¹¹⁹ The first column contains survivors, prisoners, population and all the 12 provinces that compose the territory of Rwanda. In addition, the following information is reflected:

- More than half of the population does not wish to actively get involved in the Gacaca proceedings (44% + 10% = 54%)
- 23% of the respondents will act as judges and will, therefore, not testify (during proceedings, judges cannot testify because they will be considered third party)
- Only 23% of the population will actively participate in the Gacaca proceedings
- The largest part of testimony will come from survivors and prisoners
- The two provinces of MVK (the capital city) and that of Byumba have the high percentages as spectator and abstention. This may be due to the high proportion of new residents who returned after 1994 from neighboring countries, Europe and elsewhere. Byumba province also has less active participation because, being under RPF control before and during genocide, its population did not participate in killings. Those other provinces with low participation, such as Kigalingali and Kibungo, are those with a high number of victims during genocide. Generally, however, it is hard, according to the surveyors, to understand fully the reasons for the low participation observed during the survey.
- Among prisoners, 100% of those who confessed will testify. However, the prisoners who did not confess, will not testify. Although they may not be necessarily guilty, it would be more useful to know the reasons why they did not confess in the first place. This said, the prisoners remain the main actors in Gacaca testimonies.
- According to the survey, those who abstain from the Gacaca process either do not believe that the Gacaca will eradicate the culture of impunity, which according to the general opinion, led to genocide (this is mainly among survivors), or they fear for the security of the accused after Gacaca (this is mainly among the criminals' relatives).

¹¹⁹ National Unity and Reconciliation Commission (N.U.R.C). Republic of Rwanda, Opinion Survey On Participation in Gacaca and National Reconciliation, 4-5.

I. HOW DO GACACA COURTS ASSERT THEIR LEGITIMACY

It would be a waste of time and resources if the Gacaca courts do not enjoy people's credibility and confidence from the moment prosecutions start for the simple reason that people would simply not testify. Thus, for the Gacaca courts to gain legitimacy, they must portray themselves as an all communities (victims and guilt inclusive) centered process. All communities have to trust and support Gacaca.

The opinion survey on participation in Gacaca and national reconciliation shows that the general opinion, including that of prisoners and survivors, is a unanimous (95%) that Gacaca will recognize the innocence of wrongly accused prisoners.¹²⁰ This shows that prisoners, their relatives and the population, will support the proceedings. The population response also shows their conviction, at 90%, of the integrity of judges and of their commitments to search for truth and justice.¹²¹ These attitudes will enhance the legitimacy of Gacaca because the prosecuted and the general population will believe in these judges during trials.

Elsewhere, the Gacaca courts must keep consistency, transparency and impartiality in order to assert their legitimacy. They have to be perceived not as justice providers, but as reconcilers of all the communities.

J. HOW DO THE GACACA COURTS RECONCILE THE COMMUNITIES?

Rwandan society was deeply affected by the 1994 genocide. The Tutsi communities do not know why genocide was organized against them. Some even still do not know where the bodies of their families and loved ones are located so that they can be given a decent burial. Also however, even a percentage of the Hutu community does not know why they killed their neighbors, friends or relatives.

Proponents of transitional justice largely agree that a necessary requirement for healing a society that has experienced mass violence is learning the truth about what happened. In Rwanda, all the untold truth is expected to come out during these trials because the killers, now prisoners who have confessed in prisons, will be brought back to their respective scenes of the crimes. Prisoners will tell the public who they killed, where

¹²⁰ National Unity and Reconciliation Commission (N.U.R.C). *Republic of Rwanda, Opinion Survey On Participation in Gacaca and National Reconciliation*, 13.

¹²¹ *Ibid.*, 17.

the bodies are, who were their accomplices during genocide and why they did it. Many are expected to ask for forgiveness (at least those who will testify). This truth, to survivors, may be a shock or cause another trauma. However, it will start a process of social healing. According to the above-mentioned survey, the question asking whether confessions by accused people will be a factor towards reconciliation, 95% of the population answered, “Yes”.¹²² Furthermore, the general opinion recognizes (at 100%) that survivors are motivated by the search for the truth and justice.¹²³

Survivors need to identify those who are responsible for crimes committed against their families, and the need to see them sentenced. To a lesser extent, the population thinks that survivors are motivated by the desire to reconcile themselves with others in the communities. Younger prisoners feel the same way. During the testimonies, survivors will also tell their stories in the form of prosecution, witness, or speaking in their own defense. Thus, they will be able to liberate themselves from being trapped in the past. The trauma literature suggests that “victims who are able to recount the events of their victimization in the context of acknowledgement and support may be able to receive the benefits of closure.”¹²⁴

In addition, the Gacaca courts by holding individuals accountable for their acts will alleviate collective guilt by differentiating between the perpetrators and innocent bystanders, hence promoting reconciliation. The individualizing of guilt is also crucial in the eradication of the dangerous perception that a whole community of Hutu is responsible for violence and atrocities. Thus, the success of Gacaca will enhance individual healing and reconciliation and then will extend to all communities to reach the national level.

¹²² National Unity and Reconciliation Commission (N.U.R.C). *Republic of Rwanda, Opinion Survey On Participation in Gacaca and National Reconciliation*, 22.

¹²³ Ibid.

¹²⁴ Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the contribution of justice to Reconciliation,” *Human Rights Quarterly*, No. 24 (2002), 593.

K. WHAT CAN BE DONE TO MAXIMIZE THE POTENTIAL FOR GACACA SUCCESS?

More than 10,000 Gacaca courts spread across the country will conduct proceedings concurrently. Some constraints need, however, to be cleared for these courts to be successful. Special attention must be paid to the following problems.

First, the Gacaca courts are very expensive. They are facing financial and logistical constraints for the functioning of more than 10,000 Gacaca courts, including among others, the training of judges, transportation and communication, computers, furniture, papers, etc. If not adequately solved, the problems may cause long delays at a time that it is recognized that Gacaca's success depends on the speed of its rulings, according to the principle of 'justice delayed is justice denied'.

Second, concerns such as 'you cannot eat peace' or 'an empty stomach does not listen', generally found in countries emerging from conflict, are also shared in Rwanda, especially within the survivors communities. Thus, poverty reduction is paramount as a national reconciliation ingredient. Poverty eradication would pave way for the process of forgiveness, making reconciliation possible and solving questions such as this widowed Rwandan woman's question: "How can I forgive, when my livelihood was destroyed and I cannot even pay for the schooling of my children."¹²⁵ In this case and many similar cases, it might be very hard to think of any reconciliation before improving social welfare. Thus, economic prosperity would provide the well-being of the needy and greatly enhance the success of Gacaca.

A third concern is security. According to the survey, half of the population believes that prisoners who do not confess may keep silent because they fear reprisals from their accomplices. Also however, 70% of those who confessed fear reprisals from their counterparts who did not confess.¹²⁶ The same feelings are expressed for the security of judges and witness survivors. These concerns, if not cleared in people's minds, may affect the Gacaca outcomes seriously. They may influence, for instance, the judges' decisions.

¹²⁵ Ervin Staub, "Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation," *Political Psychology*, Vol. 21, No. 2 (Spring 2000), 379.

¹²⁶ National Unity and Reconciliation Commission (N.U.R.C). Republic of Rwanda, *Opinion Survey On Participation in Gacaca and National Reconciliation*, 15.

In short, the Rwandan Government has to play a big role in removing these obstacles. It has probably to request international assistance in resolving the logistical and financial problems for the running of the Gacaca courts but also in areas of poverty reduction and socio-economical welfare of the citizens. Furthermore, a show of force may be necessary during the proceedings in order to deter any attempts to disrupt the process or negatively influence people minds.

L. STRENGTHS AND WEAKNESSES OF THE GACACA COURTS.

Accessibility must count among the strengths of the Gacaca courts. Their proceedings will be carried out in the local language, within walking distances, with simple procedures which do not require the services of a lawyer, and without the delays associated with the formal courts as observed in the preceding chapters. In most cases, the type of justice these courts will offer (based on reconciliation, and rehabilitation) is more appropriate to people living in closed-linked communities who must rely on continuous social and economic cooperation with their neighbors. The Gacaca courts will also be highly participatory, giving the survivors, the offenders and the community as a whole a real voice in finding a lasting solution. The fact that they implement sentences that do not necessarily require prison effectively reduces prison overcrowding and may allow prison budget allocations to be diverted towards social development purposes. This will allow the offender to continue to contribute to the economy and to pay compensation to the victims. It also prevents the economic and social dislocation of the family. The expenses of Rwanda's prisons cost the government more than USD \$20 million per year.¹²⁷ Finally, Gacaca courts revive traditional forms of dispensing justice based on Rwandan culture.

However, there have been some critics of the Gacaca process. Human rights organizations and legal observers have been particularly vocal in their criticisms of a system that does not incorporate the international standards of fair trials. These same critics argue that in Gacaca trials, the accused do not have lawyers, that the population will at the same time be both complainant and judge. While these preoccupations would make sense in the traditional form of justice, they are not justified in the case of Gacaca. Defendants do not need lawyers, because the communities are the lawyers.

¹²⁷ Harrell, 80.

Some Rwandans have also expressed skepticism towards the Gacaca process. Janvier Mbonishimana, a taxi driver who lost his parents, three brothers and a sister, sees the Gacaca courts as useful for genocide suspects, but not for anybody else. He argues that the genocide suspects are lucky because they are going to be freed.¹²⁸ Others oppose the Gacaca system, which they know will certainly return the killers to the villages where the survivors, in most cases widows and children, are desperately poor and fearful. Alphonsine Uwimana, a victim, explains:

Put yourself in our place, someone raped you, and then you see him come back, a free man. Understand our fears, suppose one day he is drunk or you have a confrontation in public, then he starts bragging that he raped you, what then?¹²⁹

These are normal reactions of people who experienced a high degree of suffering and trauma during genocide. However, those feared confrontations may or may not happen, and are certainly not sufficient grounds to abandon the process.

¹²⁸ Meng-Try Ea, “Strengths and Weaknesses of the ICTR and the Gacaca Courts in Rwanda,” Searching for the Truth-PUBLIC DEBATE, Special English Edition, Fourth Quarter 2003, *Documentation Center of Cambodia (DC-Cam)*, 57.

¹²⁹ Ibid.

VI. CONCLUSION

This thesis has argued that in pre-colonial time, Rwandans constituted three homogenous groups of people – Hutu, Tutsi and Twa - who shared the same culture and lived in harmony. There was no evidence of war or violence of any kind reported during their coexistence. As the writer Peter Uvin states: “They spoke the same language, they believed in the same god, shared the same culture, belonged to the same clans, and lived side by side throughout the country.”¹³⁰ However, the colonialists, in their search to ensure their domination, broke this homogeneity through the ‘divide and rule policy’. The colonialists suppressed the mobility that existed between classes inherent to the Rwandan culture and established distinct and permanent ethnic groups. During the post-independence era until the genocide, these distinctions were codified and institutionalized and created the conditions that led to the 1994 genocide, an event that left the country devastated.

Drawing on Nuremberg and Tokyo case studies, this thesis demonstrated that trials are necessary to stabilize the post-war situation. As one author stated, unless crimes are “investigated and punished, there can be no real growth of trust, no implanting of democratic norms in society at large, and therefore no genuine consolidation of democracy.”¹³¹ However, at the time of the post-World War II trials, many criticisms were leveled. Some argued that they wrongly prosecuted individuals for acts of state. Others advanced the “victor’s justice” and “moral equivalency” arguments that the tribunals neglected, for example, to prosecute the allies for bombing Dresden, Hiroshima, Nagasaki or anyone from the Soviet Union for conduct that equaled in barbarity that of the Nazis. In short, many, like the then Chief Justice Stone of the United States Supreme Court, labeled the trial as a “high class lynching party.”¹³² However, for many others including the Germans themselves, the trials at Nuremberg began a process of transformation. The association of that place and the crimes symbolized how justice can

¹³⁰ Peter Uvin, *Aiding Violence: The Development Enterprise in Rwanda*, (West Hartford, Connecticut: Kumarian Press, 1998), 14.

¹³¹ Harrell, 45.

¹³² Minow, 30.

transform horror into hope. Other positive critics argued that, considering the atmosphere of the time of trials, “the deliberations associated with the Nuremberg trial may well have forestalled a bloodbath.”¹³³ This was possible given the atrocities committed by the Germans, not only to the Jews, but also to the populations of occupied Europe. Hence, the legal process served as a barrier to direct action, most likely vengeance. On the one hand, this thesis has shown that in South Africa, the TRC was conceptualized and legalized at a time when there was still significant concern about cementing the transition to democracy and facilitating peaceful relations between political parties. Thus, critics say that the TRC enterprise was flawed in its basic design and in its definition of the reconciliation. The dispute focuses on the approach. Some argue that the TRC was a top-down approach to reconciliation, meaning that it was imposed and hence failed to allow local dynamics to play out. In contrast, the proponents of bottom-up approach to reconciliation argue that the latter sees society as the sum of its parts, or in terms of a healthy society requiring healthy individuals. Hence, national reconciliation is not possible without local reconciliation. People need to be guided and supported at the national level but not controlled from there. When there is no strong support at all from the state, the whole enterprise is likely to fail, as in the Liberian case.

The government of Rwanda faced extremely challenging situations during the post-genocide era. Given a devastated infrastructure, and a total lack of human and financial resources, all local initiatives to resolve the incarceration problem yielded unsatisfactory results. For example, out of the entire government budget for the year 2002, estimated at \$200,000,000, more than 15% flowed to prisons, courts and reparations.¹³⁴ Even if the financial resources were provided, the handicap would still remain in the shortage of trained staff. It has been estimated that, at that speed, it would take 200 years to clear the prisons.

On the other hand, the ICTR, with its lavish budget of around \$100,000,000 per year, half that of the entire government of Rwanda, also failed to bring speedy justice. Thus, the formal justice model of the ICTR also appears incapable of providing the basis

¹³³ Smith, 303.

¹³⁴ Harrell, 54.

for justice or reconciliation in Rwanda. The formal justice system has seriously compromised human rights standards, such as the right to a speedy trial and to minimal conditions of detention.

The Gacaca enterprise is probably Rwanda's laudable attempt to deal efficiently with the question of justice. Anchored in Rwandan cultural mechanisms, the Gacaca courts are expected not only to speed up the trials, but also to initiate, implement, and reinforce the process of national reconciliation. The survey showed that the majority of prisoners and a good percentage of the population are ready to participate in the Gacaca proceedings.

Gacaca is still a project. Hearings are slated to start sometime between March and April of 2005. However, research shows that it presents a better alternative than the two models already applied in Rwanda.

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